TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~429.~~ 186

ROBERT A. PHILLIPS, PLAINTIFF IN ERROR,

vs.

CHARLES W. PAYNE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 4, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 429.

ROBERT A. PHILLIPS, PLAINTIFF IN ERROR,

vs.

CHARLES W. PAYNE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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1 Supreme court of the District of Columbia.

ROBERT A. PHILLIPS
vs. } At laws. No. 11852.
CHARLES W. PAYNE.

To Hon. William Strong, associate justice of the Supreme Court of the United States:

The petition of the above named Robert A. Phillips respectfully represents that he considers himself aggrieved by the final judgment of the supreme court of the District of Columbia, sitting in general term, rendered on the 12th day of May, 1874, in this cause, & inasmuch as the amount in controversy is of the value of more than one hundred dollars, exclusive of costs, but less than one thousand dollars, & he has no right to have a writ of error issued except by the special allowance of one of the justices of the Supreme Court, & being desirous to sue out a writ of error to the Supreme Court of the United States, he herewith submits for inspection the accompanying record, by which it is manifest that the errors complained of involve questions of law of
2 such extensive interest and operation as to render the final decision of them by the Supreme Court of the United States desirable.

It will appear from the record that the principal question involved was the constitutionality of the act of Congress of July 9th, 1846, which purports to authorize the retrocession to the State of Virginia that part of what was included in the District of Columbia, on the west side of the river Potomac, known as the county of Alexandria, & that by sustaining the demurrer to the declaration & entering judgment thereon against the plaintiff the constitutionality of such act of Congress was affirmed. In sustaining such constitutionality & the validity of legislation depending thereon, & in rendering judgment against this plaintiff upon such demurrer, your petitioner submits there was error.

The constitutional power of Congress to make such retrocession has been seriously questioned & denied ever since it was first attempted, which was very soon after the establishment of the seat of Government.

At the time of the passage of the act in question, many members of both houses in Congress denied the constitutional power of Congress to pass such an act. Besides, an inspection of the act will show that the entire question of retrocession was submitted to the vote
3 of the people of Alexandria County alone, which it is claimed is an unauthorized delegation of legislative power.

In March, 1867, an act passed the House of Representatives by a vote of 111 to 28, nearly four to one, declaring such act unconstitutional, but was not acted upon by the Senate for the reason, as is believed, that such action should not be had until there should be a judicial decision of binding authority upon such question.

The question is one of interest, not only to the people of the county of Alexandria & of the District of Columbia, but to the whole people of the United States.

Wherefore your petitioner prays that your honor will direct an order to the clerk of the supreme court of the District of Columbia, allowing the writ of error prayed for as provided by the acts of April 2, 1816, & of March 3d, 1863, relating to appeals & writs of errors from the courts

of the District of Columbia. And as in duty bound your petitioner will ever pray, &c.

ROBERT A. PHILLIPS,
By W. WILLOUGHBY, *his Attorney.*

4 To the clerk of the supreme court of the District of Columbia:

I, William Strong, associate justice of the Supreme Court of the United States, having maturely considered the petition of Robert A. Phillips, plaintiff, in an action at law against Charles W. Payne, addressed to me, & the errors therein assigned, & having carefully inspected the record of the proceedings of the said supreme court of the District of Columbia in the said cause, and being of opinion that the errors assigned involve questions of law of such extensive interest and operation as to render the final decision of them by the Supreme Court of the United States desirable, & that a writ of error to the Supreme Court ought to be allowed, do hereby order & direct that said writ of error be allowed upon the terms and conditions prescribed by law in cases where, in said court, the amount in controversy is less than one thousand dollars, to wit, upon giving bond as required by law in the penalty of $250, upon the issuing & service of a citation as prescribed by the statute.

In witness whereof I have hereunto affixed my official signature this 23d day of May, 1874.

W. STRONG,
Associate Justice Sup. Court U. States.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the United States for the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Robert A. Phillips, plaintiff, & Charles W. Payne, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears.

6 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison F. Waite, Chief-Justice of the said Supreme Court, the 2d of June, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL] R. J. MEIGS, *Clerk.*

Allowed by,
WILLIAM STRONG,
Associate Justice.

7 The United States of America to Charles W. Payne, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Robert A. Phillips is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable D. K. Cartter, chief-justice of the supreme court of the District of Columbia, this second day of June, in the year of our Lord one thousand eight hundred and seventy-four.

D. K. CARTTER,
Ch'f Just.

8 I hereby admit service of the within citation this 3d day of June, 1874.

EDMUND BURKE,
Attorney for Defendant.

9 Know all men by these presents that we, Robert A. Phillips, David A. Windsor, H. O. Smith, & F. E. Corbett are held and firmly bound unto Charles W. Payne in the full and just sum of two hundred and fifty dollars, to be paid to the said Charles W. Payne, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirtieth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately at a term of the supreme court of the District of Columbia, in a suit depending in said court, between Robert A. Phillips, plaintiff, & Charles W. Payne, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles W. Payne, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next;

Now, the condition of the above obligation is such that if the said Robert A. Phillips shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ROBERT A. PHILLIPS. [L. S.]
DAVID A. WINDSOR. [L. S.]
H. O. SMITH. [L. S.]
F. E. CORBETT. [L. S.]

Approved by D. K. CARTTER,
Ch'f-Justice.
Sealed and delivered in presence of—
W. WILLOUGHBY.

10 In the supreme court of the District of Columbia the 21 day of January, 1874.

ROBERT A. PHILLIPS, PLAINTIFF,
vs.
CHARLES W. PAYNE, DEFENDANT. } At law No. 11852.

You are hereby commanded to appear in this court, on the first day

of its special term, occurring 20 days after service of this writ on you, to answer the plaintiffs' suit, and show cause why he should not have judgment against you for the cause of action, stated in his declaration.

D. K. CARTER, *Chief Justice.*
R. J. MEIGS, *Clerk.*
By JOB BURNARD, *Asst. Clerk.*

NOTE. The special terms of this court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

W. WILLOUGHBY.

(Endorsed:) Issued January 21, 1874. Served copies of the declaration, notice to plead, and this summons on the defendant, the 21 day January, 1874.

A. SHARP, *Marshal.*
Per GRAVES.

11 In the supreme court of the District of Columbia, the 21 day of January, 1874.

ROBERT A. PHILLIPS
vs. } At law No. 11852.
CHARLES W. PAYNE.

The plaintiff sues the defendant for money had and received by the defendant, for the use of the plaintiff, to wit, the sum of $165.18.

For a further cause of action, the plaintiff sues the defendant, for that whereas, the territory known as the county of Alexandria, in pursuance of the Constitution of the United States, by an act of the general assembly of the State of Virginia of December 3d, seventeen hundred and eighty-nine, was ceded to the United States, together with all the rights and jurisdiction therewith; and whereas, as authorized by the Constitution of the United States, an act of Congress was passed, accepting such cession; and whereas said county, together with the county of Washington, which had been ceded to the United States by the State of Maryland, was by Congress set apart as the seat of Government of the United States, embracing a territory of ten miles square, which was ordained, organized, and established as the District of Columbia, over which the Constitution of the United States requires that Congress shall exercise exclusive legislation in all cases whatsoever; and whereas subsequently, to wit, on the ninth day of July, 1846, in violation of the Constitution of the United States, and without any legal authority, Congress passed an act, purporting to authorize a vote to be taken by the people of said county, to determine whether the said county shall be retroceded to the State of Virginia, and declaring, that in case a majority of the votes of said people were cast in favor of such retrocession, the said county should be retroceded, and forever relinquished, in full and absolute right and jurisdiction; and whereas a majority of said votes were cast in favor of retrocession, upon which, and without further authority or action of Congress, the general assembly of the State of Virginia passed an act, declaring that

12 the said county of Alexandria was thereupon re-annexed to the State of Virginia, and constituted a portion thereof; and whereas, since the said act of 1846, the said State of Virginia has assumed to exercise jurisdiction and control of said county, and has assumed to authorize the election of officers for the said county, among which is

the office known as the collector for the township of Washington, in the said county; and under such pretended authority the said defendant was elected such collector, and now assumes to exercise the duties thereof as such collector; and whereas said State has also assumed to enforce within the said county its laws for the assessment and collection of taxes upon persons residing therein, and upon property therein situated; and whereas the said defendant, claiming to be such collector, and claiming that an assessment had been made under the laws of Virginia upon the property of this plaintiff, who resides in said county, and who is the owner of large and valuable real estate, and other property therein, which is the property upon which such assessment is claimed to have been made, and that there was payable to him as such collector, from this plaintiff, upon such assessment, the sum of $165.18, demanded the payment thereof; and whereas, in case of refusal, the said defendant, being so directed by the said pretended laws of the State of Virginia, would have levied upon the property of this plaintiff and sold the same to satisfy such claim, and in this would have been supported by the power of the State of Virginia, which this plaintiff could not resist; and whereas this plaintiff, in order to prevent such sacrifice of his property thus threatened to be made, delivered the said sum of money to defendant, on the 21st day of January, 1874, under protest, and notifying said defendant at the time that he regarded the exaction of such money as illegal, and wholly unauthorized, on the ground that the said county of Alexandria was not within the jurisdiction or control of the State of Virginia, but that it was within the jurisdiction of the District of Columbia; that all laws and acts purporting to place the said county within the jurisdiction or control of the State of Virginia were contrary to the Constitution of the United States, and wholly void, and that neither this plaintiff nor his property situated in said county, was subject to the assessment laws of the State of Virginia, and that the defendant, as a pretended officer under such laws, had no authority to exact the payment of said sum of money, and notified said defendant that he should immediately prosecute him in a court
13 of competent jurisdiction, and warned him not to pay over said money to any officer of the State of Virginia, nor to any person other than himself; and whereas the said enactment of Congress of 1846, and all acts and pretences depending thereon, or growing out of the same, and the said vote of the people of the county of Alexandria, and the said act of the general assembly of Virginia, of 1846, and all acts of the State of Virginia assuming power or jurisdiction of the said county, and all the acts of the said defendant as such assumed collector, are contrary to the Constitution of the United States, and wholly unauthorized, illegal, and void; by reason of which, and of the facts herein set forth, the said plaintiff avers that the said defendant, on the 21st day of January, 1874, become indebted to the said plaintiff in the further sum of $165.18, lawful money of the United States, for money had and received by the defendant for the use of the plaintiff; and, being so indebted, he, the said defendant, afterwards, in consideration thereof, and of the premises, to wit, on the 21 day of January, 1874, undertook and promised the said plaintiff to pay him the last-mentioned sum of money, when he, the said defendant, should be thereunto requested.

Yet, the said defendant, not regarding his said promise and undertaking, hath not, although often requested so to do, as yet, paid the said sum of money, or any part thereof, but hath wholly neglected and

refused so to do, and still neglects and refuses so to do, to the plaintiff's damage of $500, and therefore he brings this suit.

And the plaintiff claims $165.18, with interest thereon from the 21st day of January, 1873, besides costs.

W. WILLOUGHBY,
Attorney for Plaintiff.

The plaintiff is to plead hereto on or before the first special term of the court, occurring twenty days after service hereof; otherwise, judgment.

W. WILLOUGHBY,
Attorney for Plaintiff.

14 In the supreme court of the District of Columbia.

ROBERT A. PHILLIPS
vs.
CHARLES W. PAYNE. } At law. No. 11852.

The defendant says the second count of the plaintiff's declaration is bad in substance.

EDMUND BURKE,
Attorney for Defendant.

Filed February 12th, 1874.

In the supreme court of the District of Columbia.

ROBERT A PHILLIPS
vs.
CHARLES W. PAYNE. } At law. No. 11852.

The plaintiff says that the second count of the delaration is good in substance.

W. WILLOUGHBY,
Attorney for Plaintiff.

In the supreme court of the District of Columbia, special term, Feb'y 12, 1874.

Present, D. K. Cartter, justice.

ROBERT A. PHILLIPS
vs.
CHARLES W. PAYNE. } At law. No. 11852.

At the request of the parties, by their respective attorneys, it is ordered that the defendant's demurrer to the plaintiff's declaration be heard in the general term, in the first instance.

15 TUESDAY, *May* 12, 1874.

In general term. Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Wylie, Humphreys, and MacArthur.

ROBERT A. PHILLIPS, PL'FF,
vs.
CHARLES W. PAYNE, DEF'T. } At law. No. 11852.

And now come here as well the plaintiff, by his counsel, Mr. Wil-

loughby, as the defendant, by his counsel, Mr. Burke. And the plaintiff, by his said counsel, moves to amend his declaration by striking therefrom the first count thereof, and it is done accordingly. And because it seems to the court that the second count of the declaration is bad in substance, the defendant's demurrer thereto is sustained; and it is thereupon considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defense, to be taxed by the clerk, and that he have execution thereof.

16 *Authentication of record.*

Clerk's office, supreme court of the District of Columbia.

Clerk's certificate.—I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 3d day of June, 1874.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 429. Robert A. Phillips, plaintiff in error, vs. Charles W. Payne. District of Columbia sup. court. Filed 4th June, 1874.

IN THE

SUPREME COURT

OF THE

~~DISTRICT OF COLUMBIA.~~ United States

Robert A. Phillips,

vs. No. 186

Charles W. Payne.

~~Argument upon demurrer to the declaration.~~ Points of Pltff. in Error

W. WILLOUGHBY,

Attorney for Plaintiff.

J. MARRIOTT HILL & CO., BOOK AND JOB PRINTERS.

1874.

Supreme Court of the United States.

ROBERT A PHILLIPS,

vs.

CHARLES W. PAYNE.

No. 186.

Points of Plaintiff in Error.

This case comes before this Court upon a writ of error directed to the Supreme Court of the District of Columbia, allowed by Associate Justice, William Strong, according to the law as now found in Sec. 848 of the Revised Statutes relating to the District of Columbia. (p. 2.)

The action was originally brought by the plaintiff in error to recover $165 18 paid by him, under protest, to the defendant, who claimed to act as collector of taxes in the county of Alexandria, under and by virtue of powers vested in him as such by the laws of Virginia. The declaration sets forth the action of Congress and the cession of the States of Maryland and Virginia, in pursuance of the Constitution, by which the District of Columbia was established as the seat of government, the act of Congress of 1846, purporting to authorize the recession of the county of Alexandria to Virginia, the action of Virginia claiming to exercise jurisdiction over the same, and avers that such action is unconstitutional; the claim and demand of the defendent that the plaintiff pay to him as such assumed collector the said sum as taxes claimed to have been assessed against the property of the plaintiff in said county, payment of such taxes under protest, and notice that he should prosecute a suit against him therefor, notifying him of the grounds of his protest, and avering, that, by reason thereof, the defendant was indebted to the plaintiff, in the said sum, for money had and received for the use of the plaintiff. (pp. 4 and 5.)

To this declaration a demurrer was interposed, issue was joined thereon, (p. 6), and argument being had thereon, the demurrer was sustained. (p. 7).

ASSIGNMENT OF ERRORS.

1. The Court erred in sustaining the constitutionality of the act of Congress of July, 1846, purporting to authorize the people of Alexandria county in the District of Columbia to determine whether said

county should be retroceeded to the State of Virginia, and the action of said people and of Virginia in relation thereto as described in the plaintiff's declaration.

2. The Court erred in sustaining the action of the defendant in assuming to act as collector under the laws of Virginia in said county, and in attempting to enforce the laws of Virginia in said county as set forth in said declaration.

3. The Court erred in holding and deciding that the laws of Virginia passed since the said act of 1846, have any force or operation in said county of Alexandria.

4. The Court erred in sustaining the demurrer to the declaration of the plaintiff.

The plaintiff in error files herewith the printed points and argument used by him in the Supreme Court of the District of Columbia as such points and argument in this Court, and in addition thereto suggests the following considerations:

The question before the Court is not a new one. The constitutional power of Congress to pass such an act has been questioned and denied by the ablest lawyers of the country whenever it has risen. Several attempts have been made to accomplish retrocession in Congress before the passage of the act of 1846, and it was always resisted upon this ground. The committee of the Senate, to whom this act was referred, reported against it, and it was strenuously resisted on this ground by members of both Houses. The chairman of that committee, Mr. Haywood, of North Carolina, in sustaining the report of the committee, said, "Doubts were entertained by many how far it was competent for "Congress to recede what the Constitution had for a particular pur- "pose authorized them to accept. The States of Maryland and Vir- "ginia had ceded this territory to Congress to be taken under its ex- "clusive jurisdiction for the seat of government, and Congress, in the "execution of that intention, solemnly declared by enactment its ac- "ceptance of the grant, and this District should be perpetually the "seat of government."

In 1867, an act carefully prepared in Committee and presented by Thaddeus Stevens, passed the House of Representatives, declaring that this act of 1846 was in violation of the intent and meaning of the Constitution of the United States, and repealing such act on such ground by a vote of 111 to 28, nearly four to one. It failed, however, to be reported by the Senate.

It is believed, not only that the general sentiment of the country is, that said act of 1846 was unwise, but that the prevailing opinion of the bar is that it was unconstitutional.

As to the suggestion that the case presents a question of a political nature, which the Court may decline to pass upon in a case of this kind, it may be said—

The action is an ordinary action of assumpsit as to which there can be no question of jurisdiction, and, if necessary to properly determine it, the court must pass upon these questions no matter how important they may be. The Constitution says that the judicial power extends to all cases in law and equity arising under this constitution the laws of the United States," &c. In Rhode Island vs. Mass. 12 Peters, at page 744, this court said that the courts have jurisdiction on the subject of boundary involving only political rights: "Let the question arise as it may, in a case in equity, or in a case of law, of a civil or criminal nature, and whether it affects the rights of individuals, of States, or the United States, and depends upon charters, laws, treaties, compacts, or cessions, which relate to boundary." See also Cohens vs. Virginia, 6 Wheaton; Somers' case, 3 Gratton; 1 Vesey Sr. 202; 2 Vesey Sr. 337, 356.

In Dred Scott vs. Sandford, 19 How., this Court did not hesitate in a simple case of assault and battery to decide upon the greatest political question that was ever acted upon by Congress: and to hold that the act of 1820, known as the Missouri Compromise, which had been acquiesced in for thirty-four years, was unconstitutional and void.

The inquiry whether this is a political question upon which this Court is bound by the action of Congress is the precise question submitted. Whatever is within the discretion and power of Congress cannot be reviewed by the court, but the question is, *was* it within the discretion and power of Congress. In Luther vs. Borden 7 How. it was held that Congress had the right to decide which was the legitimate government of the state *because* that power had been given to Congress under the Constitution, especially by the fourth section of the fourth article. See p. 42, 7 How. The question here is, had Congress the constitutional power to do what it did? and this is a judicial question. As said in the same case, "The high power has been conferred on the Court of passing judgment upon the state sovereignties, and of the legislative and executive branches of the Federal government, and of de-

terming whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States."

As to the point that Congress by the acceptance of the territory ceded to it by particular States fully exhausted its power in this respect the following authorities are cited :

"The authority of an agent is *ipso facto* determined by the completion of the purpose for which that authority was given."

Dunlop's Paley on Agency, Note chap. 3, sec. 4 ; Russell on Factors, 314, 315.

"Thus, if a man sells goods as a broker, the moment the sale is completed he is *functus officio.*"—Id.

"If an agent, in pursuance of his authority, has made a complete sale of a ship, the agency is "*functus officio,*" and therefore has its natural termination, *and the agent cannot recind the contract.*

Story on Agency, sec, 499 ; 10 Ala. 386 ; 1 Bailey, 648.

An auctioneer has no authority, after the sale is made, to treat of the terms upon which title is to be made.

Paley on Agency, chap. 3, sec. 4 ; Story on Bailments, sec. 207 ; Seton vs. Slade, 7 Versey, Jr., 276 ; 1st American Leading Cases, 711, Ed. of 1871.

Congress is the agent of of the people. It acts not for itself but for the people. When then it accepted the territory ceded, it accepted it not for itself but for the people of the United States. The cession was made not to Congress but to the people. Upon the completion of this acceptance the people become invested with the title and right of sovereignty over this territory, and could not be divested of it except by their own act. Powers not delegated by the Constitution are reserved to the States or to the people.

Suppose that the Coustitution had provided that the territory to be ceded might be accepted by the President. Who would then have supposed that the President could recede this territory ?. Yet, why should the power of recession be implied in one case more than in the other ?

Let the language used be understood in its ordinary sense, and be applied to any thing else than Congress, and the absurdity of the claim that the power to retrocede may be implied from it becomes plainly apparent.

W. WILLOUGHBY,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the District of Columbia.

ROBERT A. PHILLIPS,

vs.

CHARLES W. PAYNE.

Argument of Plaintiff.

This is an action in assumpsit, brought for the purpose of recovering a sum of money, which the plaintiff claims was illegally exacted from him by the defendant, who, under color of law, appears to be a collector of taxes for the State of Virginia, in the county of Alexandria. The parties are both residents of said county, and the taxes were assessed under color of the assessment laws of the State of Virginia.

The plaintiff paid such taxes under protest, denying the jurisdiction of the State of Virginia over the said county, and her right to enforce her laws therein, claiming such county to be in the District of Columbia; and that the act of Congress, purporting to retrocede such territory to Virginia is unconstitutional and void.

The action is brought in the usual form that actions are brought, to test the validity and legality of a tax. (See Elliott vs. Swartwout, 10 Peters, 150; 5 Wall. 720; 751; 11 Wall. 108, 113; 12, Wall. 1.)

The declaration sets out the grounds of complaint, alleging the the unconstitutionality of the several acts by which the retrocession was attempted, and the consequent illegality of legislation depending thereon and the payment, under protest, of the sum sought to be recovered. To this declaration a demurrer has been interposed, and issue joined upon such demurrer.

In order to place the whole subject before the court, it may be useful briefly to review the history of the establishment of the seat of Government, and to present the substance of the various enactments on that subject.

Previous to the formation of the Constitution, under the articles of confederation it was provided that, "The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months."

There was then no established seat of government, but, as is well known, Congress sat in different places, sometimes in New York, and sometimes in Philadelphia, Trenton, and Annapolis. That there should be such established seat of Government was suggested by the Statesmen of that period and the proper place for it was discussed by them. (See the Madison Papers where the subject of the proper location is often mentioned.)

There does not appear, so far as the records show, to have been much discussion upon this subject in the convention that framed the constitution. The first proposition offered by Charles Pinkney, on the 29th of May, 1787, was to give Congress the power in the following terms:

"To provide for the establishment of a seat of government for the United States not exceeding———miles square in which they shall have exclusive jurisdiction". (Journal of Federal Convention page 76.)

On the 18th of August, 1787, the proposition was offered and submitted to a committee in the following language:

"To fix and permanently establish the seat of Government of the United States, in which they shall possess the exclnsive right of soil and jurisdiction" id 260.

On the 5th of September, 1787, the committee submitted a report, using the same terms as are now employed, with the single exception of the words, "The Legislature" instead of "Congress." id 328.

The language finally adopted, as now appears upon that subject in the Constitution, is as found among the enumerated powers of Congress as follows:

"The Congress shall have power, "to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals dock-yards, and other needful buildings." (Art. 1, Sec. 8, Clause 17, of the constitution.)

This is the only clause, referring to the subject, in the constitution.

The first Congress, after the adoption of the Constitution, sat and deliberated in the city of New York, at its first session, commencing March 4, 1787; and at its second session, commencing January 4, 1790; and at Philadelphia at its 3d session, commencing Dec. 6th, 1790. Several of the States were anxious to have the seat of government within its borders, and especially Pennsylvania, Maryland, and Virginia. These states passed acts of cession of such territory not exceeding ten miles square as might be selected by the General Government.

The following act was passed by the State of Maryland, Dec. 23, 1788;

"An act to cede to Congress a district of ten miles square in the state for the seat of Government of the United States:"

"That the representatives from this State in the House, of Representatives of the Congress of the United States, appointed to assemble at New York on the first Wednesday of March next, be, and they are hereby, authorized and required on behalf of this State, to cede to the Congress of the United States any district in this State not exceeding ten miles square which the Congress may fix upon to accept for the seat of Government of the United States.

'In November, 1791, after Congress had fixed upon the territory for such seat of Government, another act was passed, ceding to Congress and the Government of the United States such territory in substantially the same language as that used in the act of Virginia of Dec. 3, 1789."

The following is the act of Virginia upon this subject.

AN ACT for the cession of ten miles square, or any lesser quantity of territory within the State, to the United States in Congress, for

a permanent seat of the General Government. Passed the 3d of December, 1789.

"I. Whereas the equal and common benefits resulting from the administration of the General Government will be best diffused, and and its operations become more prompt. and certain, by establishing such a situation for the seat of the said Government, as will be most central and convenient to the citizens of the United States at large, having regard, as well to population, extent of territory, and free navigation to the Atlantic Ocean through the Chesapeake Bay, as to the most direct and ready communication with our fellow citizens in the western frontier: And whereas, it appears to this assembly, that a situation combining all the considerations and advantages before recited, may be had on the banks of the river Potomac, above tide-water, in a country, rich and fertile in soil, healthy and salubrious in climate, and abounding in all the necessaries and conveniences of life; where, in a location of ten miles square if the wisdom of Congress shall so direct, the states of Pennsylvania, Maryland, and Virginia, may participate in such location."

"II. *Be it therefore resolved by the General Assembly*, That a tract of country, not exceeding ten miles square, or any lesser quantity, to be located within the limits of this State and in any part thereof as Congress may by law direct, shall be, and the same is hereby, forever ceded and relinquished to the Congress and Government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section, of the first article, of the Constitution of the Government of the United States."

"III. *Provided*, That nothing herein contained shall be construed to vest in the United States any right of property in the soil, or to affect the rights of individuals therein, otherwise than the same shall, or may be transferred, by such individuals, to the United States."

"IV. *And provided, also*, That the jurisdiction of the laws of this commonwealth, over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease, or determine until Congress, having accepted the said cession, shall, by law provide for the government thereof under their jurisdiction in the manner provided by the article of the Constitution before receited."

The acts of Congress accepting the territory thus ceded by Maryland and Virginia are as follows:

AN ACT establishing the temporary and permanent seat of Government of the United States.

"SECTION 1. *Be it enacted* by the Senate and House of Representatives of the United States of America in Congress assembled, That a district of territory, not exceeding ten miles square, to be located as hereafter, directed on the river Potomac, at some place between the mouth of the Eastern Branch, and Conococheague be, and the same is hereby, accepted, for the permanent seat of Government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district, shall not be affected by this acceptance, until the time fixed for the removal of the Government thereto, and until Congress shall otherwise by law provide.

SECTION 2. *And be it further enacted*, That the President of the United States be authorized to appoint, and by supplying vacancies happening from refusals to act or other causes, to keep in appointment, as long as may be necessary, three Commissioners, who, or any two of them shall, under the direction of the President, survey, and proper metes and bounds define and limit a district of territory, under the limitations above mentioned; and the district so defined, limited, and located, shall be deemed the district accepted by this act, for the permanent seat of Government of the United States.

SECTION 3. *And be it further enacted*, That the said Commissioners, or any two of them, shall have power to purchase, or accept such quantity of land on the Eastern side of the said river, within the said district, as the President shall deem proper for the use of the United States; and according to such plans as the President shall approve, the said Commissioners, or any two of them, shall, prior to the first Monday of December, one thousand eight hundred, provide suitable buildings for the accommodation of Congress and of the President, and for the public officers of the Government of the United States.

SECTION 5. *And be it further enacted*, That prior to the first Monday in December next, all offices attached to the seat of Government of the United States, shall be removed to, and until the first Monday in December, in the year one thousand eight hundred shall remain at, the city of Philadelphia, in the state of Pennsylvania, at

which place, the session of Congress next ensuing the present shall be held.

SECTION 6. *And be it further enacted*, That on the said First Monday of December, in the year one thousand eight hundred, the seat of the Government of the United States shall by virtue of this act be transferred to the district and place aforesaid; And all offices, attached to the said seat of Government, shall accordingly be removed thereto by their respective holders, and shall, after the said day, cease to be exercised elsewhere; and that the necessary expense of such removal shall be defrayed out of the duties on imports and tonnage of which a sufficient sum is hereby appropriated." Approved July 16, 1790.

(Laws of the United States Vol. 1. Chapter 28.)

AN ACT to amend an act for establishing the temporary and permanent seat of Government of the United States.

"*Be it further enacted*, That so much of the act entitled An Act for establishing the temporary and permanent seat of Government of the United States" as requires that the whole of the district of territory, not exceeding ten miles square, to be located on the river Potomac, for the permanent seat of the Government of the United States shall be located above the mouth of the Eastern Branch, be, and the same is hereby, repealed; and that it shall be lawful for the President, to make any part of the territory, below the said limits, and above the mouth of Hunting Creek, a part of the said district, so as to include a convenient part of the Eastern Branch and of the lands lying on the lower side thereof, and also the town of Alexandria, and the territory so to be included shall form a part of the district, not exceeding ten miles square, for the permanent seat of the Government of the United States, in like manner, and to all intents and purposes, as if the same had been within the purview of the above recited act. *Provided*, That nothing herein contained shall authorize the erection of the public buildings otherwise than on the Maryland side of the river Potomac as required by the aforesaid act."

Approved March 3, 1791.

(Laws of United States Vol. 1, 339, Ch. 17. 2nd Session.)

After the passage of the first act, the President appointed Commissioners, to survey and lay out a part of the district, and on the

24 of Jannary, 1791 he issued the following proclamation showing what he had done:

By the President of the United States.

A PROCLAMATION.

Whereas the general assembly of the State of Maryland, by an act passed on the 23d day of December, 1788, entitled "An act to cede to Congress a district of ten miles square in this State, for the seat of the government of the United States," did enact that the representatives of the said State in the House of of Representatives of the Congress of the United States, appointed to assemble at New York on the first Wednesday in March then next ensuing, should be, and they were thereby authorized and required, on behalf of the said State, to cede to the Congress of the United States any district in the said State, not exceeding ten miles square, which the Congress might fix upon and accept for the seat of government of the United States.

And the general assembly of the Commonweath of Virginia, by an act passed on the 3d day of December 1789, and entitled" An act for the cession of ten miles square, or any lesser quantity of territory within this State, to the United States in Congress assembled, for the permanent seat of the general government," did enact that a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of the said State, and in any part thereof, as Congress might by law direct, should be and the same was thereby forever ceded and relinquished to the Congress and goverdment of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the Constitution of government of the United States.

And the Congress of the United States, by their act passed on the 16th day of July, 1790, and entitled "An act for establishing the temporary and permanent seat of the government of the United States." authorized the President of the United States to appoint three commissioners to survey, under his direction, aud by proper metes and bounds to limit a district of territory, not exceeding ten miles square, on the river Potomac, at some place between the Eastern Branch and Conococheague, which district so to be located and

limited was accepted by the said act of Congress as the permanent seat of the government of the United States.

Now, therefore, in pursuance of the powers to me confided, and after duly examing and weighing the advantages and disadvantages of the several situations within the limits aforesaid, I do hereby declare and make known, that the location of one part of the said district of ten miles quare shall be found by running four lines of experiment in the following manner: that is to say, running from the court-house of Alexandria, in Virginia, due southwest half a mile, and thence a due southwest course till it shall strike Hunting creek, to fix the begining of the said four lines of experiment.

Then begining the first of the said four lines of experiment at the point on Hunting creek where the said southwest course shall have struck the same, and running the said first line due northwest ten miles; thence the second line into Maryland due northwest ten miles; thence the third line due southest ten miles; and thence the fourth line due southwest ten miles. to the beginning on Hunting creek.

And the said four lines of experiment being so run, I do hereby declare and make known, that all that part within the said four lines of experiment which shall be within the State of Maryland, and above the Eastern Branch, and all that part within the same four lines of experiment which shall be within the Commonwealth of Virginia, and above a line to be run from the point of land forming the upper cape of the mouth of the Eastern Branch, due southwest, and no more, is now fixed upon and directed to be surveyed, defined, limited, and located for a part of the said district accepted by the said act of Congress for the permanent seat of the government of the United States; hereby expressly reserving the direction of the survey and location of the remainng parts of the said district, to be made hereafter, contiguous to such part or parts of the present location as is or shall be agreeably to law.

And I do accordingly direct the said commissioners appointed agreeably to the tenor of the said act to proceed forthwith to run the said lines of experiment, and the same being run, to survey, and by proper metes and bounds to define and limit the part within the same which is hereinbefore directed for immediate location and acceptance; and thereof to make due reprot to me, under their hands and seals.

In testimony whereof, I have caused the seal of the United States to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelbhia, the 24th day of January, in the year of our Lord 1791, and of the independence of the United States the fifteenth.

[SEAL.] GEORGE WASHINGTON.

By the President:

THOMAS JEFFERSON.

With this he submitted his report to Congress, stating that he had designated a part thereof and describing it, and recommended the act be so amended as to allow the district to be located according to the survey made by him, and so as to include the city of Alexandria. (See 1 Statesman's Manuel,111) In pursuance of this recommendation the second act was passed as an amendment to the the original act. In accordance with this act the President completed the survey, and designated the bounds of the district, so as to include the whole ten miles square, and made his report to Congress, stating that he had accepted the same as authorized by Congress, as shown by the following proclamation:

By the President of the United States.

A PROCLAMATION.

Whereas, by a proclamation bearing date the 24th day of January of this present year. and in pursuance of certain acts of the State of Maryland and Virginia, and of the Congress of the United States therein mentioned, certain lines of experiment were directed to be run in the neighborhood of Georgetown, in Maryland, for the purpose of locating a part of the territory, of ten miles square, for the permanent seat of government of the United States, and a certain part was directed to be located within the said lines of experiment on both sides of the Potomac, and above the limit of the Eastern Branch, prescribed by the said act of Congress;

And Congress, by an amendatory act, passed on the 3d day of this present month of March, have given further authority to the President of the United States to make any part of the said territory below the said district, so as to include a convenient part of the Eastern Branch and of the lands lying on the lower side thereof, and also the town of Alexandria:

Now, therefore, for the purpose of amending and completing the location of the whole of the said territory, of ten miles square, in conformity with the said amendatory act of Congress, I do hereby declare and make known, that the whole of the said territory shall be located and included within the four lines following—that is to say:

Beginning at Jones's point, being the upper cape of Hunting creek, in Virginia, and at an angle in the outset of forty-five degrees west of the north, and running in a direct line ten miles, for the first line; then beginning again at the same Jones's Point and running another direct line, at a right angle with the first, across the Potomac, ten miles, for the second line; thence from the termination of the said first and second lines, running two other direct lines of ten miles each, the one crossing the Eastern Branch aforesaid, and the other the Potomac, and meeting each other in a point.

And I do accordingly direct the commissioners named under the authority of the first-mentioned act of Congress to proceed forthwith to have the said four lines run, and by proper metes and bounds defined and limited; and thereof to make due report, under their hands and seals; and the territory accepted by the said acts of Congress as the district for the permanent seat of the government of the United States.

In testimony whereof, I have caused the seal of the United States to be affixed to these presents, and signed the same with my hand. Done at Georgetown aforesaid, the 30th day of March, in the year of our Lord 1791 and of the independence of the United States the fifteenth.

[SEAL.] GEORGE WASHINGTON.

By the President:

THOMAS JEFFERSON.

It will be seen that Congress made provision for a temporary seat of government at Philadelphia, for ten years, at the end of which time, and commencing on the first Monday of December, 1800, the permanent seat of government was to be in the district, thus deeded, located and accepted as the constitution provides. Congress did sit at Philadelphia for that period; and its first session at Washington, as provided by the act, commenced on the first Monday of

December, 1800, provision having been made during such period for its accommodation, and the accommodation of the departments.

As will be seen by the annals of Congress, Vols. 1st and 2nd, the location of this district was the subject of a long and angry controversy, continuing for many days, on numerous occasions, during nearly the whole of the first and second sessions of Congress. It became so serious, that, even at that early day, threats were made of the dissolution of the Union in reference to it. Several places were mentioned, but the question soon became, whether such location should be at some place on the river Susquehanna, or on the Potomac. Mr. Madison appears to have been the leading advocate for the location on the Potomac, and his view finally prevailed by a small majority.

No one can read those discussions, without being impressed with the conviction that such location was regarded by the statesmen of that period, as a matter of vital importance, and more so than it would have been, if it had been thought that it could have been changed in the future. It is evident that they regarded a settlement once made, as made forever.

The location as finally made, was due more to Virginia than any other State. She believed that such location, within and near her borders would be a great advantage to her, as it actually has been; and for that purpose she ceded her territory, and offered every possible inducement, and in consideration of these inducements in part at least the location was made.

After having obtained these advantages, it is not strictiy equitable that she should seek, or be permitted to withdraw the cession she had made to obtain them, nor is it in strict accordance with the sentiment, which seems to have inspired Mr. Madison, when, during the discussion, in reply to a suggestion that there might be an attempt to change such location, he said, "I trust some regard will be had to the plighted faith of the Government."

Soon after coming to Washington, on the 27th of February, 1801, Congress passed an act establishing a government for the district. Laws of the United States, Vol. 5, ch. 87, page 267, and ch. 95, page 287.

By these acts the district was divided into two counties; Alexandria on the west side of the river, and Washington on the east side. Courts were thereby established, and necessary regulations made for carrying on its local affairs, and from that time until 1846, Congress exercised exclusive legislation, at various times, over the whole district, as provided by the constitution, and as we contend, it should have continued to do up to the present time.

After the lapse of over a half a century, from this cession of her territory to the United States, and after she had secured the benefit of the location of the seat of Government, near her borders, as she desired, and for which she made such cession, Virginia begins to agitate the subject of a retrocession; and on the 3d day of Feby. 1846, her legislature passed an act, signifying her willingness to take back the territory, when the Congress shall recede the same; and Congress is besieged by petitions for such retrocession, and on the 9th of July, 1846, finally passed the following act:

AN ACT to retrocede the county of Alexandria in the District of Columbia to the State of Virginia.

Whereas, no more territory ought to be held under the exclusive legislation given to Congress over the District, which is the Seat of the General Government, than may be necessary, and proper, for the purposes of such a seat; and, whereas experience hath shown, that the portion of the District of Columbia, ceded to the United States, by the State of Virginia, has not been, nor is ever likely to be, necessary, for that purpose; and whereas, the State of Virginia, by an act passed on the third day of Feby. 1846, entitled "An act, accepting, by the State of Virginia the county of Alexandria, in the District of Columbia, when the same shall be received by the Congress of the United States" hath signified her willingness to take back the said territory, ceded as aforesaid; Therefore.

SECTION 1. *Be it further enacted*, That, with the assent of the people of the county and town of Alexandria, to be ascertained as hereinafter prescribed, all that portion of District of Columbia ceded to the United States, by the State of Virginia, and all the right, and jurisdiction therewith ceded, over the same, be, and the same are hereby ceded, and forever relinquished to the State of Virginia, in

full, nad absolute right, and jurisdiction, as well of soil, as of persons, residing, or to reside therein.

SEC. 2. *Be it further enacted,* That nothing herein contained, shall be construed to rest in the State of Virginia any right of property in the Custom House, and Post Office of the United States, within the town of Alexandria, or in the seat of the territory hereby receded, so as to affect the rights of individuals, or corporations therein, otherwise than as the same shall, or may be transferred by such individuals, or corporations, to the State of Virginia.

SEC. 3. *And be it further enacted,* That the jurisdiction and laws, now existing in the said territory, ceded to the United States by the State of Virginia as aforesaid, over the persons and property of individuals therein residing, shall not cease, or determine, until the State of Virginia shall hereafter provide by law, for the extension of her jurisdiction, and judicial system, over the said territory hereby receded.

SEC. 4. *And be it further enacted,* That this act shall not be in force, until after the assent of the people of the county, and town of Alexandria shall be given to it, in the mode hereinafter provided. Immediately after the close of the present session of Congress, the President of the United States shall appoint five commissioners, (any three of whom may act,) citizens of the said town or county of Alexandria, and freeholders, within the same, who shall be sworn before some justice of the peace in and for the said town or county, to discharge the duties hereby imposed upon them, faithfully, impartially, and to the best of their ability. Those commissioners, or any of them, shall proceed, within ten days after they are notified of their appointment, to fix upon the time, place and manner of taking the vote within the town or county of Alexandria; and shall give notice of the same, by advertisement in the newspapers of the said town. And on the day, and at the place, so appointed, every free, white, male citizen, of the United States, who shall have resided therein, for six months preceding the time when he offers his vote, insane persons, and paupers excepted, shall vote, *viva voce,* upon the question of accepting, or rejecting the provisions of this act. The said commissioners shall preside when this vote is taken, and decide all questions arising in relation to the right of voting under this act. Within three days after this vote is taken, as aforesaid, the said commissioners shall make out three statements of the re-

sult of this poll, upon oath, and under their seals. Of these. one shall be transmitted to the President of the United States, one to the Governor of the Commonwealth of Virginia, and one shall be deposited in the Clerk's office of the county court of Alexandria. If a majority of the votes so given shall be cast against accepting the provisions of this act, then it shall be void, and of no effect; but if a majority of the said votes, should be in favor of accepting the provisions of this act, then this act shall be in full force; and it shall be the duty of the President of the United States to inform the Governor of Virginia, that this act is in full force, and effect, and to make a proclamation of the fact.

SEC. 5. *And be it further enacted.* That in such case, the right of property in the half square in Alexandria, on which stands the court house, bounded by Columbus, Queen, and Princess Streets, and the half square, on which stands the jail, bounded, by Princess, St. Asaph, and Pitt Streets, shall be conveyed to the Governor of Virginia, and his successors, for the use of the county and corporation of Alexandria, forever; and the Solicitor of the Treasury of the United States is hereby authorized, and required, in the name, and on the behalf of the United States, to make all the proper, and necessary conveyances for that purpose.

SEC. 6. *And be it further enacted.* That Congress will in no event assume, and pay the debt, or any part thereof, now due by the corporation of the City of Alexandria.

Appproved July 9th, 1846.

In accordance with this act, Commissioners were appointed, an election was had, according to which, there were 763 votes in favor of accepting the provisions of the act, to 222 against it, resulting in a majority of 541; proclamation of the fact was made by the President; and thereupon, without further action of Congress, Virginia passed an act, assuming jurisdiction over the county, declaring it to have been reannexed to the Commonwealth; and has since continued to exercise such assumed jurisdiction.

This act of Congress of 1846, and all legislation depending thereupon, we contend to be unconstitutional and void.

Before enteriug upon the discussion of this question of constitutionnality, it may be proper to advert to some questions of a preliminary character.

The suggestion has been made, that this court has not jurisdiction of the subject of inquiry, because, it is of a political nature, and that the court cannot determine political questions.

In the case of Rhode Island vs. Massachusetts, 12 Peters 569, the question was one of boundaries; which state had jurisdiction over a certain territory. The court sustained the jurisdiction, because the rights of property were concerned.

This is so stated in Georgia vs. Stanton, 6 Wall. 73 "It is only where the rights of persons, or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief." 6 Wall. 75. The bill was dismissed in this last case because, as stated. "No case of private rights, or private property infringed, or in danger of actual, or threatened infringement, is presented by the bill in a judicial form for the judgment of the court."

Now it cannot be questioned, that this case is one involving private rights, and is therefore cognizable by the court.

The case of Fowler vs. Miller, 3 Dallas 411, was an action of ejectment, brought in a court of Connecticut. The plea was, that the premises in question were in New York, and that suit should have been brought in a court of that State. This involved a question of boundary, and the political rights of the two States. The jurisdiction was sustained; and it was held, that it would not affect such jurisdiction, that a State may be untimately affected by the decision. The same doctrine is held United States vs. Peters, 5 Cranch 115; and of United States vs. Bank of Georgia, J. Wheat, 204.

In Garcia vs. Lee, 12 Peters 516, the court say, that "An Act of Congress determining a political question, must control "unless it can be shown, that the act of Congress in question upon some ground or other is void, and inoperative."

In Doe vs. Braden, 16. How. the question was, as to the effect of the provisions of a treaty, made with Spain. Objection was made as to the authority of the King of Spain to make a treaty. The

court say, that the treaty making power, having recognized his authority "the treaty is therefore a law made by the proper authority; and the courts of justice have no right to annul or disregard any of its provisions, *unless they violate the Constitution of the United States.*"

In Virginia vs. West Virginia, 11 Wall. 39, it was held, that a question of boundary, though a political one, was the subject of judicial inquiry, and that the court had the right to pass upon the effect of a vote, authorized by the constitution, or ordinance of a convention of the States.

This case is one involving private rights, and also the constitutinality of the act of Congress, which is interposed as a political decision; and therefore the authority and power of Congress to make such decision, and the court has jurisdiction.

Another suggestion is, that the authority over the county in question, is such a *defacto* authority, that the court cannot question its acts. But a slight consideration will show that this is not a case in which any such principle can be applied. This in the first place, is not a case involving the validity of some past transaction, which had taken place with reference to such authority, without objection and without protest. It is a case directly made between a person, who claims to act by virtue, of the authority of the assumed power, and one who resists or disputes his authority, on the precise question of the legality of the assumed authority. It is not a collateral proceeding, but a direct one. The proceedings of a *defacto* court may not be questioned collaterally, but they can in a direct proceeding brought for the purpose of testing their legality. But the acts of officers or assumed officers do not stand upon as high ground as judicial proceedings. We have made the officer himself a party, and he is in court to defend, if he can the authority for doing the act of which we complain.

This is a widely different case from that of a controversy, between two rival powers in a foreign county. In such case the one recognized by Congress, would be regarded as the lawful one by the courts. But in this case, the court is called upon, to pass upon its own jurisdiction, and authority over the disputed territory. The question is between *its own* Sovereign, and another. It is not claim-

ed that Virginia is a *defacto* government, but the question, is has it jurisdiction, or power, to take the property of the plaintiff, for its purposes in this county; can the officer justify on the ground that the law, under which he assumed to act, extends over such territory?

The case of Fowler vs. Miller, 3 Dall. 411; before cited, was like this in this respect, and no one thought of suggesting such a question in that case. It cannot be, that because an authority is usurped, and that it is sustained by such force that it has the color of legality, that those who are subject to its action, cannot, in a proper manner, contest the legality of such action, or question the authority of such usurpers.

But one more objection has made to inquiry upon this subject; and that is, that it has been recognized, and acted upon, and acquiescense in, so long, that it ought not now to be disputed. In other words the proposition, is that, although the act may be utterly void, when done, as it is, if unconstitutional, yet, that it has acquired legality by such acquiescence and recognition. The answer to this, is, that has never been recognized or acquiesced in, by any persons or body *having authority* to recognize it, or acquiesce in it. If Congress had no power to enact such a law originally, it can have no power to give it force, by acquiescence in it, or recognition of it. It is in both cases a question of power.

The repetition of an unauthorized act, a hundred times does not render it lawful, or more lawful than at first.

If Congress could not do it by a solemn and express enactment, it surely could not by recognition or implication. If such a question could be between Congress and Virginia, it might perhaps be stopped from questioning its own power. But it is a question involving the rights of the plaintiff, as one of the people of the United States. The people of the United States have not recognized the act or acquiesced in it, for this could not be done by Congress or the executive. It could be done only by a convention, or through the action of the States, in the mode provided by the Constitution; if, as we expect to be able to show, Congress had not the power to perform the act of which we complain.

It cannot be that time could impart validity. Constitutional

rights are not divested by the mere lapse of time, and there is no statute of limitation applicable to this subject.

Having thus as we believe disposed of the objections, to the inquiry, as to the validity and constitutionality of the act of Congress, of 1846, we ~~present~~ to such inquiry. Moved

It cannot be denied, in view of the history of Congress before the adoption of the Constitution, of its having no fixed place for its sessions, of the difficulties that had arisen in consequence of its being within the limits, and jurisdiction of some State, of its inability, in consequence thereof, to provide for its own protection, that the object of the clause in relation to this subject, was, to provide a Seat of Government which should be permanent, certainly, as compared with its former temporary character, and which should be of such an extent, as to meet the difficulties which had before been felt.

The language is, not, expressly to provide a seat of government, as was first proposed; but the district is spoken of as *becoming* the seat of government, as the result of a cession of particular States of territory for such purpose, and the acceptance thereof by Congress. Over such territory Congress has power to exercise exclusive legislation. In regard to establishing or fixing a seat of Government the only power given to Congress, is, to *accept* such district.

Now it is well known that Congress has no powers, except such as are given to it by the Coustitution. In this respect, it is wholly unlike the legislature of any State. "We look to the Constitution of the United States for *grants* of legislative power; but in the constitution of the State, to ascertain if any, *limitations* have been imposed Cooley's Const., Lim. 173, and cases cited.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Tenth Amend. to Constitution.

This is implied in the very first article of the Constitution, which says "all legislative power *herein* granted shall be vested," &c.

The Government of the United States can claim no powers, which are not granted to it by the constitution; and the powers actually granted, must be such, as are expressly given, or given *by necessary implication.*"

Marton vs. Hunter's Lessee 1 Wheaton 326.

Gibbons vs. Ogden.

Dred Scott vs. Sandford 19 How 401, 435.

Hepburn vs. Griswold 12 Wall.

"It is to be remembered, that, the rule of interpretation for the State constitution, differs totally from that which is applicable to the constitution of the United States. The latter instrument must have a strict construction; the former a liberal one. Congress can pass no laws, but those which the constitution expressly authorizes, either expressly, or by clear implication; while the assembly has jurisdiction of all subjects over which its legislation is not prohibited."

Commonwealth vs. Hartman 5 Harris 119; J. S. Black, Ch. J.

Quoted with approval in Weister vs. Hall 52, Pa. St. 477; Agnew, Ch. J.

These principles are fundamental, and familiar.

No express power can be found to reestablish the seat of government, or to recede, or relinquish the jurisdiction imposed upon Congress in relation to it. A question for consideration then, is:

Is such power *clearly implied*, and is such implication a necessary one?

We contend, first, that the power given to Congress, to establish a seat of government, has been fully executed, and is therefore exhausted. Congress, in so doing, has acted as the agent of the people.

It was authorized to accept the district for the people, for a particular purpose.

Jurisdiction, and control, then, belongs to Congress; but jurisdiction is one thing, and the act of acceptance is another, can it be said, that from the word *acceptance*, can be neccessarily implied the power of relinquishment? We say not.

We think, that it may be said, that to determine whether an act is authorized by an implied power, depends upon whether such act is a means for carying into execution an express power. This is entirely consistent with the remark, so often quoted in McCullock vs. Maryland 4 vol. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriated, which are really adapted to that end, which are not prohibited, are constitutional."

It has been urged, that, in this respect, the power given by this clause is similar to those enumerated by the other clauses of the section. But a plain difference can be seen in the nature of the

powers, as well as by the terms in which they are conferred. The other powers are from their very nature continuous, and necessarily must, or can be exercised, whenever, and as often as the occasion arises. For example, the power to declare war, *necessarily* means, to do so, whenever the occasion arises, which, in the judgment of Congress, renders it justifiable, and proper. So with the other enumerated powers. Even in this very clause, the power to exercise exclusive legislation is necessarily a continuous one, and is necessarily construed, as one susceptible of repetition. But why should it be necessarily implied, that Congress could, as often as it chose, accept a district for such purpose? If so, it could do it every session; and thus, the very object it was designed to accomplish would be defeated; and, if a portion of the jurisdiction could be relinquished, the whole of it might be, and it would be left as defenceless as when, without avail, it, at one time, called upon the Staie to protect it from a threatened mob It will be observed, that the terms employed in relation to such acceptance, are quite different from those used in relation to the other enumerated powers. The principle, and leading power, referred to in this very clause, relates to legislation, and to its exercise, and not to acceptance, or the act of establishing a seat of government. This is mentioned only incidentally, or by way of description. Is there not some significance in the change of phraseology from that contained in the first proposition upon this subject?

The lannuage first used shows an intent to establish a "permanent" seat of government, but being, in terms the same as that applied to the other enumerated powers, there might have been more reason for saying, that, like these, it would have been capable of repetition, or of being exercised, as they can be, whenever occasion arises for the exereise of such power.

This act of acceptance is not an ordinary act of legislation. It might, with just as much propriety, have been submitted to any other body of men, or to the judicial or executive branch; just as, in the case of the act of cession by Maryland, authority to make such cession, was conferred upon the members of the House of Representatives, sent from that State to the next Congress; and just as Congress *finaliy did* authorize the President to make the selection within certain limits, and to declare in, advance, that such territory, so selected, should be deemed the district accepted. Congress, in this

acceptance acted rather as agents of the people, or as a commission, for a particular purpose, and not necessarily, as a legislative body, having a general power to accept districts for seats of government, as often as they should deem an occasion to arise for such an act. What they did in this capacity, they cannot undo or repeat, as the Congress of the United States, in its ordinary legislative capacity.

But it has been said, that the authority given over this district, is like that given over forts, magazines, arsenals, dock-yards, and other needful buildings, mentioned in this clause; and that certainly, over these, the jurisdiction may be relinquished.

Suppose that over such places the jurisdiction might be relinquished, in cases where they are abandoned, and are no longer required for the use of the government, yet there is a plain distinction to be seen, even in the language used. In regard to these, Congress acquires jurisdiction by *purchase*, with the consent of the legislature of the State. The word *purchase* implies, necessarily, the acquirement of *property*, and *ownership* of it, and ownership implies the right to dispose of it.

Let us analyze more closely this clause of the constitution, to see what powers are thereby confered upon Congress, both in relation to the district, and to the other places mentioned. The first duty to be performed by Congress, is to *accept* a district, which may be ceded by particular States. This is a distinct act, and one which may be performed by virtue of the power implied by the fact, that such district is described, as one, that may become the seat of government, by the acceptance of Congress. When the district has been ceded by particular States, and this has been accepted by Congress, this power is fully executed. The result of these two acts, one by particular States, and the other by Congress, is, that such district *becomes* the seat of government. Congress alone, could not, under this clause, have established the seat of Government. The part performed by it, was, simply to accept a district, ceded by the States. This act of acceptance was in fact performed, as an act, distinct from any other power, expressed in this clause. It did not exercise legislation over it for nearly ten years after the act of acceptance.

The second power conferred upon Congress by this clause, is, to *exercise exclusive legislation* over such district. This was a mere

power to exercise such legislation. It was not required to exercise such legislation, at once. It was a power, which Congress could refrain from using for a time. Until such power was exercised, the laws in existence before its cession, would continue, according to the law of nations, which is, that when territory passes from one jurisdiction to another, the laws, before such change of jurisdiction, remain unchanged, until and only as they are displaced by the law making power of the new government. Such power was not, in fact, exercised for the period of ten years.

The third power given by this clause to Congress, is, to purchase places for the erection of forts, magazines, arsenals, dock-yards and other needful buildings.

This may be done with, or without the consent of the legislature of the State, in which the same may be. If purchased without such consent, it would hold the property in the same manner as an individual, subject, in all respects, no doubt, to the laws, and jurisdiction of such State. But if the legislature consents to such purchase, then Congress has power to exercise exclusive legislation over such places. This power of legislation is, like that which may be exercised over the district, which becomes the seat of government. But, Congress may, in these cases, refrain from the exercise of such power. Still, the non user of the power is no argument, that the power does not exist. As this power, however, is one that results, in part, from the previous consent of the legislature to the purchase, it may, perhaps be limited, or qualified by the terms of such consent. For example, if a place is purchased for the use of a fort, the power of legislation, which Congress has over it, may be limited to the time, that it is used as a fort. Such limitation may, perhaps, be implied, from the purchase being made for such a purpose; for, when property is conveyed for a particular purpose, it remains in the grantee only so long as it is used for such purpose; and when abandoned, it reverts to the grantor. The property in the place then ceasing, the jurisdiction should cease.

Now a further consideration of the language used in reference to the district, and that in reference to these places, will show quite a plain distinction between them.

In regard to the district, Congress becomes the supreme legislative power, by virtue of the *cession* of particular States. This word, "*cession*," is one peculiarly applicable to sovereignty. It means, to

yield, to give place to, to surrender, to relinquish. It does not mean to transfer, or assign. Virginia, in this case, simply withdrew her sovereignty over the territory ceded; and the sovereignty of the United States took its place. That of Virginia, may be said to have overshadowed it, or hung over it, like a cloud. This cloud simply rolled back, and another that representing the sovereignty of the United States, moved forward, and occupied its place. By this surrender of sovereignty, the United States acquired no *property* in the soil.

The sovereignty of Congress over such district is not, then *acquired* from Virginia. It is a power, imposed upon Congress by the *people of the United States.* Virginia could not have given to Congress any such power. It is entirely derived from the constitution of the United States, and obtains all its force from this clause of the constitution. This sovereignty, too, it will be seen, is entirely independent of any property in the district; and has no connection with the idea of property, or ownership.

But, it will be seen, that the sovereignty that Congress has over the places mentioned in this clause, depends upon ownership, or property, in such places. They must be *purchased* by the United States. Congress does not have the power of exclusive legislation over such places, unless they are *purchased*, with the consent of the legislature. Purchase alone does not render them subject to such power; nor does the consent of the legislature alone. Both must concur. The legislature could not, alone empower Congress to exercise such legislation. Congress could not acquire such power from the legislature.

It will thus be seen, that the sovereignty, which Congress has over such places, depends upon *property* in those places, and cannot exist without such property. The word *purchase* implies property, and ownership. Absolute ownership, implies the full right of disposition; and the United States may, undoubtedly, become absolute, or qualified owners, if they are absolute owners they may dispose of the property. But when they cease to become owners, when they no longer have property in the places, then their sovereignty over such places must cease. Of course, the extent of sovereignty, must depend upon the extent of the purchase, if the purchase is limited in time, the sovereignty must be so limited.

Thus, it will be seen, that the foundation, or one of the essential

elements of the sovereignty, that Congress has in such places is *property*. It cannot exist without it. And, as in the idea of property, is contained the right of transfer, limitation, qualification, and disposition; necessarily, the sovereignty, which depends upon it, may be qualified, limited, and caused to cease.

But, with the sovereignty that Congress has over the district, there is no idea of property. It exists without it. It can have no connection with it. It exists because Virginia has withdrawn its own sovereignty, as it was permitted by the constitution to do, in the language of the constitution *ceded* it; and Congress, having accepted such cession, it becomes the seat of government of the United States; and thereupon the people have conferred this sovereignty, this exclusive power of legislation.

It will thus be seen, that while, according to the terms of this clause of the constitution, the power to exercise legislation is the same, in regard to the district, as in regard to the other places, mentioned; yet, that such power is *created* by, or has its origin in, essentially different elements, and depends upon essentially different acts.

While, therefor, its authority may be the same, in regard to its *exercise*; it may, on account of the different manner in which it is obtained, be different in regard to its limits, qualification, and disposition; and on this account, the one may be perpetual, and necessarily so, while other may be limited in duration.

Without being, therefore, required to maintain, that the power to exercise exclusive legislation must be perpetual, over the places mentioned in the latter part of the clause under consideration, at least, any farther than we have indicated, we *do* contend, that it must be so, necessarily, in the district, which has once been ceded by particular States, accpted by Congress, and thereby become the seat of government.

As we have already seen, such acceptance is an entirely distinct act, and has been fully performed. While from the word purchase, which implies the power of ownership, may be implied the power of disposition, there is no such necessary implication from the word *accept*. Congress has accepted the district, for the purpose of its

becoming the seat of government. It thereby became the seat of government. In the act of such acceptance, Congress was the agent of the people. The people thereby become invested with the rights of sovereignty over such district.

The people invested Congress with the power of exclusive legislation over this district, but no where can be found the power to dispose of the rights of sovereignty, or to transfer them to any other power.

When such district has once become the seat of government, by the concurrent acts designated, then, the constitution declares, "Congress *shall* have the power" to exercise exclusive legislation over it; of course, over the whole of it. Now, how can Congress, abdicate, or divest itself of the power, which the constitution says, it *shall* have?

It would seem to need no argument to prove, that Congress could not divest itself of any inherent power, it possesses. It could not, for example, be said to be able to divest itself of the power to declare war, to provide a navy, or to regulate commerce. It might refrain from the exercise of such power, but it could not destroy the power itself. To do so, would be suicidal.

Congress is the creature of the people, with certain powers, and capacities. To take from it any of these attributes, would be, to make it a different body from that which the people created. It might as well be said of a person, that he has the power to, or could, voluntarily, deprive himself of the power of thought, or of the rights of citizenship of the country, wherein he is born, and resides.

See Ohio Life Insurance and Trust Co. vs. Debolt 16 How.

Cooley's Const Lim. 280 to 284 and cases cited.

Id. 125 to 127, and cases cited.

An attempt has however been made, by some to make a distinction between, what has been designated as inherent powers, and those which may be acquired by Congress, conceding, that Congress cannot divest itself of inherent powers, but claiming that it may, of such, as may be acquired; that from the right to acquire may be, implied, as incident thereto, the right to renounce or relinquish. Even if there is in any case any ground for such distinction, not admit, that such implication necessarily follows from th to acquire. It ~~might~~, from the right to acquire power.

But however this may be, the power of exclusive legislation Congress has over such district, is not one that could be designated

as an *acquired* power, in distinction from an *inherent* power. An inherent power, is one, that is made an attribute of Congress by the people. Any power, that the Constitution declares, Congress *shall have*, must be an inherent power. It could not be, otherwise, the body, which the people, by the constitution have created.

Now, whence does Congress derive this power of exclusive legislation?

Is it acquired by its own volition?

Can it be said to be acquired from the people, or State of Virginia?

Certainly not. As we have already seen, this State has simply *ceded, relinquished,* its own right of exclusive legislation. That of the United States is *substituted* in its place. It is, indeed, substitute by the consent of Virginia, but the power itself is not one, created by Virginia, and transferred to Congress. The power itself is the creation of, or emanation from, the people of the United States. Virginia did not delegate this power to Congress. The people of the United States delegated it to that body.

The sovereignty, that existed in the district, after it become the seat of government, was an entirely different thing, from that existing before. It was different in its origin, emanating from a different source, and entirely different in its nature, and extent. It could not, then, have been acquired from Virginia. A state, or nation, cannot *transfer* its sovereignty. It can yield its own, and permit that of another to occupy its place. The legislature of Virginia could not transfer the sovereignty of the people of that state. If it could, it would still be the sovereignty of that people. It is impossible, from the very nature of sovereignty. Legislative power, like certain rights, is inalienable.

Congress did not establish the seat of government. This was done by the Constitution, which declared, that the result of two acts, one by Congress, and one by particular States, should be, that such territory should thereby become the seat of government. It was, then, the constitution, that gave to Congress the power to legislate over such district.

There can, then, be no substantial ground for saying, that Congress can divest itself of the power of exclusive legislation, over the district, which has once become the seat of government, in the mode provided by the constitution, and transfer such power of legislation to the State of Virginia.

It will be observed, that the enactment of cession by Virginia, is, that "the same is hereby *forever ceded and relinquished* to the Congress, and government of the United States, in full and absolute right, and exclusive jurisdiction, as well of soil, as of persons residing, or to reside thereon, *pursuant to the tenor and effect* of the eighth section, of the first article, of the constitution of government, of the United States." This shows the construction, put upon this clause, by the legislature of Virginia. Does it not also show a most absolute, and unqualified relinquishment of all claim of jurisdiction, in the strongest, and clearest terms, that could be used? And, after such an entire surrender, has the State the least claim whatever to such jurisdiction?

The act of Congress too, accepting such cession, conveys the same idea. It is to establish a "permanent" seat of government. On both sides, then, so far as there could be a compact between the United States and Virginia it was made to be permanent and perpetual.

In pursuance of this idea, Congress, as soon as it occupied the district as such seat of government, or very soon after, established a form of government, providing a judiciary, and executive officers, and all the means of carrying on such government, entirely indedependent of Virginia, or any other State, making it a territory by itself; and in most respect, as to the other States, a foreign country, and entirely so, as to Virginia alone. It certainly was just as independent of Virginia, as it was of Maine. or of South Caralina, so far as its political relations were concerned.

This being so, what reason or ground was there, for ceding the jurisdiction to Virginia, any more than there would have been to any other State? What would, however, been thought of the proposition, to cede it to the State of Maine, or Maryland, or Mississippi? Would not Virginia have revolted against it? And would not the impropriety of so doing been most manifest? Yet the principle would have been precisely the same, and just as constitutional, in in the one case, as in the other.

It has been suggested, that the power to pass the act of 1846, may be found in the third section, of article four, which enables Congress "to dispose of, and make all needful rules, and regulations,

respecting the territory, or other propery, belonging to the United States. It is sufficient, in answer to this, to say, that the term territory, as here used, has been held to be merely descriptive of one kind of property, and as equivalent to the word lands. United States vs. Gratiot 14 Peters 537.

See also Dred Scott vs. Sandford 19 How. 385 436, where this subject is elaborately considered.

Out of such territory may, indeed, be formed new States, for this is expressly permitted by the constitution. Section 3, Article 4, of the constitution.

Congress may dispose of the soil, which it ownes as property, but it cannot transfer, or yield up its sovereignty. It may allow the territories to make local regulations for themselves, but they must be made, subject to the power of Congress. What would be thought of Congress ceding jurisdiction over Colorado to the State of New York?

The unconstitutionality of this act is, however, perhaps more plainly apparent, from the fact, that, as showed by its terms, its purports to delegate legislative power. Even if Congress had the power to divest itself of legislative jurisdiction over a portion of the district; it has never exercised this power, by any constitutional means.

It will be seen, that it submits the whole question to the people of Alexandria county, alone. If they so vote, then it is to become a law; otherwise, it is to be void.

The first section of the constitution provides that: "All legislative powers *herein* granted, shall be vested in a Congress of the United States, which shall consist of a Senate, and House of Representatives."

'One of the settled maxims in constitutional law, is that the powers conferred upon the legislature to make laws, cannot be delegated by that department to any other body, or authority. Where the sovereign power of the State has located the authority, there it must remain."

Cooley's Const. Lim. 116., and cases there cited.

The legislature neither must nor can, transfer the power of making laws to any body else, or place it anywhere, but where the people have.

Locke on civil govn't. Sec. 142

Powers of local government may be granted to cities and towns by the State.

But even these must relate entirely to local affairs. It cannot affect persons, and property without the limits of the locality. Besides, such powers are at all times subordinate to the legislative power, and can be withdrawn at pleasure. No attribute of sovereignty can be yielded up to a locality.

In the case of Locke vs. Widener., Chicago Legal News, April 26, 1873 known as the local option cases, in Pennsylvania, the question was, whether the power given to a locality was a legislative power. It was conceded by all, that if so, it would be unconstitutional, and the inability of a legislature to delegate such power was adjudged in the plainest terms. In Barto vs. Himrod, 8 N. Y. 483.

The question arose, whether an act for the establishment of free schools, which was submitted to the whole people, was constitutional.

Section 10 of that act provided as follows:

"The electors shall determine, by ballot at the annual election to be held in November next, whether this act shall, or shall not become a law."

The court say, "The legislature had no power to make such submission; nor had the people the power to bind each other by acting upon it."

"The event, on which the act was made to take effect, was nothing else, than the vote of the people, or the identical question, which the constitution makes it the duty of the legislature to decide. The legislature has no power to make a State dependent upon such a contingency, because it would be confiding to others, that legislative discretion, which they are bound to exercise themselves, and which they cannot delegate, or commit to any other man, or men, to be exercised. They have no more authority to refer such a question to the whole people, than to an individual. The people are sovereign, but their sovereignty must be exercised in the mode, which they have pointed out by the constitution."

"It is not to be denied, that a law may be passed to take effect, on the happening of a future event. But the fundamental error consists, in confounding laws which become operative on a future day, with laws, which do not become operative, until approved by a popular vote.

In the first place, the law is completed, when it has passed through the form prescribed by the constitution, though its influence may not be felt, until a subject matter has arisen, upon which it can act."

The nature of the event was one, depending upon expediency. This was the very question the legislature should decide. Such expediency is a subject of discretion, and trust, and these cannot be delegated, especially by a legislature.

See also Rice vs. Fowler, 4 Harrington, Del. R. 479 6 Barr. Page 507.

Parker vs. Commonwealth, 1 Am. Law. Reg. for August 1853, 658 Am. Law, Reg. of 1854 page 591; 15 Barb. 112, 122. 23 Barb. 349.

These principles are clear, and unquestioned, in all cases. And if so, in regard to the legislature, which has all powers not prohibited, how much more in regard to Congress, with limited powers.

And if even the whole people cannot pass a legislative act, affecting the whole; how much less can a small portion thereof give validity to such an act. When these principles are applied to the act in question, there can be no hesitation in declaring it unconstitutional and void.

Whether jurisdiction over the county of Alexandria should be surrendered, was a question in which, certainly, all the people of the United States were interested. It was, in no sense, a local question. It affected the rights of every citizen. Especially did it affect the rights of the remaining portion of the district.

Its power of support, of ability to tax for local purposes, to pay its debts were directly affected, and impaired.

In regard to all its local affairs, the remaining portion had the right to its help in every respect, to its vote, its counsel, its property. But not even were the people of the district consulted. Certainly, this was the plainest violation of all right, as well as wholly unauthorized.

It cannot be denied, that the act is one purporting to be legisla-

tive in its character. It is the highest act of legislation, It is a transfer of legislative jurisdiction. It is to determine where the law making power shall be; whether in the United States or in Virginia. It is fundamental. It is an act, which, if valid, is the foundation of all sovereignty over it.

In all the history of legislation in this country, there has never been such a palpable, direct and wholly unjustifiable violation of the firmly established principle, that delegated powers of legislation cannot be delegated.

Nothing can be plainer, than that Congress has never exercised the power, even if it had it, of receding to Virginia, jurisdiction over the county of Alexandria; and on this ground, if no other, it must adjudged unconstitutional, and void.

It has been said, that the constitutionality of this act has been affirmed by the Court of Appeals of Virginia, in the case of the Bank the Potomac vs. McLaughlin 7 Grattan. A slight inspection of that of case will show, that this is a mistake. A case had been, before the so called act of retrocession, taken by appeal to the Supreme Court of the United States. Upon being decided there, it sent its mandate to the Circuit Court of Alexandria county.

The question before the Court of Appeals was, whether, according to the acts of retrocession, this was the proper course.

The constitutionality of the acts was not brought in question, but this was conceded on both sides. Under such circumstances, the mere *obiter dictum* of the court can hardly cited as authority.

The demurrer should be overruled, and judgement rendered for the plaintiff.

W. WILLOUGHBY,

Attorney for Plaintiff.

Supreme Court of the United States.

Robert A. Phillips,

vs.

Charles W. Payne.

Brief of Counsel for Plaintiff.

If it is not sufficiently shown that Congress had not the constitutional power to accomplish the fact of retrocession, and it is established that the act of 1846 is unconstitutional because it is an attempt to delegate legislative power; let us further inquire whether such retrocession has been accomplished by any other acts or implied legislation of Congress competent for such purpose.

The following comprises all legislation having any reference to to the subject.

In 1848 9th State at Large, p. 244 an act was passed entitled an act supplemental to the act of July 9th, 1846, entitled an act to retrocede the county of Alexandria &c

This act provides for the hearing of causes by the Supreme Court which had been taken to said court from the court held in Alexandria, "at the time when the jurisdiction and laws lately existing in in said county had finally ceased and determined in the manner provided for in and by the third section of the act to which this is supplemental" in the same manner as if such causes had been so removed "before the said jurisdiction and laws ceased and determined as aforesaid" and directs the Clerk of said Supreme Court to certify and transmit decrees mandates &c. to the Clerk or said Judges in Alexandria "as have been vested or shall or may be vested with jurisdiction or authority to take cognizance of the same or in any manner to carry the same into effect or to act judicially, touching

the same by any law of the State of Virginia in such case provided or hereafter to be enacted and provided."

The second section provides that the Circuit Court of the District of Columbia, shall certify decrees, judgments, orders &c. to such judge or court, as may be authorized to receive the same in Alexandria, "by any such law of Virginia as aforesaid."

One or two appropriations have been made for the Custom House in "Alexandria Virginia."

In 1871 an act was passed providing that the Circuit Court of the Eastern District of Virginia may have two terms annually at Alexandria,

The first section of the Revised Statutes relating to the District of Columbia is as follows:

Be it enacted &c, That the District of Columbia is that portion of the territory of the United States ceded by the State of Maryland for the permanent seat of government of the United States including the river Potomac in its course through the District and the islands therein."

This is all the legislation that can be found relating to the subject. Can retrocession be implied from these acts?

In considering this question, we say in the first place that it is a mere question of construction, and not a question of constitutional power. In deciding it the court is not called upon to pass upon the question whether Congress has exceeded its constitutional power and is free from those difficulties which always attend an attempt to show the unconstitutionality of a legislative act. The court have only to inquire what was the intention, and will, and purpose of Congress in the passage of these acts, and whether *by these acts themselves* they intended to divest the United States of its sovereign power over the county of Alexandria.

It will not be pretended we presume that retrocession could be accomplished by any other body than Congress.

In the United States vs. Arredando 6 Peters 738 this court says:

"A treaty of cession is a deed of the ceded territory, the sovereign is the grantor, the act is his, so far as it relates to the cession, the

reaty is his act and deed and all courts must so consider it and
eeds are construed in equity by the rules of law." Now a deed or
rant is the act of one party alone. The intention of such party
lone is a proper subject of inquiry and the instrument is to be con-
rued by its own terms.

In this respect it differs from that class of contracts made by two
arties with each other in which the *concurrent* intention of both
arties is to be sought. As to mere matters of description for the
urposes of explanation of what might otherwise be ambiguous or
bscure extrinsic evidence may sometimes be referred to, but cer-
tainly not for the purpose of determining whether the instrument
constitutes a grant.

So in a treaty or compact of cession. The legislature speaks
only by enactments. The supreme will of Congress alone is to be
ascertained and this is to be shown by the enactments themselves.
Many sorts of contracts may as between individuals be implied
from conduct or acquiescence or mutual instruments, as well as from
language used by them. But the only implications binding upon
a legislative body must be those derived from the language of its
enactments, the only instrumentality by which it can exercise its
powers. Sec 12 Peters 723, and cases there cited.

Now we contend that nothing is ever enacted by Congress ex-
cept such as is shown by express and positive terms or by implica-
tion arising from such express and positive terms, showing that at
the time the policy and propriety of what is claimed to be done was in
the mind of the members voting for it, and that they intended *by
the passage of the act itself* to accomplish such a result.

That this principle applies with greater force, when applied to
anything in the nature of a grant from the government, especially
when anything in such grant may be prejudicial to the interests of the
government.

That such principle would require, that in order to show a cession
of sovereign power especially the whole sovereign power over a por-
tion of territory, committed to the care of Congress, by the express
terms of the Constitution, for the purposes of the seat of Govern-
ment, the language of the enactment should be in the most positive
terms, showing with irresistible clearness that *at the time and by
the passage of the act itself*, such cession was intended and that

by such act the judgment of those voting upon it, upon the wisdom and policy of such cession was deliberately exercised.

Applying these principles to the legislation of Congress, relating to the subject since 1846, and it is susceptible of demonstration that retrocession has not been acomplished by it.

It cannot be denied that such legislation does *recognize and assume* that retrocession was accomplished by the act of 1846, at least *de facto.*

But there is nothing in it but recognition and assumption. There is nothing doing the act itself.

The act of 1848 is the one most plainly assuming the accomplishment of the act, and most of our comments upon this will apply to all,

The 30th Congress passed an act upon the assumption that the 29th Congress, another body, and having a different judgment *had* retroceded the county of Alexandria. It deals with it as a previously accomplished fact. But did the 30th Congress itself do this thing? Did it intend so to do? Was the policy or wisdom or propriety of such act submitted to it or passed upon by it? Did those who voted for the act of 1848 intend thereby to express their views upon the policy of retrocession? Not at all. Recognizing that it had previously and by a body of which they were not necessarily members been done "*de facto*," not of necessity "*dejure*" their only object was to regulate judicial proceedings so as to preserve the remedies of suitors in court notwithstanding the state of things resulting therefrom. That the 30th Congress did not in the passage of the act of 1848 intend *thereby* to retrocede the county of Alexandria is not left to inference. It is expressed upon the face of the act itself. Its title is "an act supplemental to the act of 1846 &c" In the body of the act, in describing the time referred to, it fixes it, as when the jurisdiction of the United States had ceased *by the operation of the 3d Section of the act of* 1846, thus expressly stating that the authority for retrocession is not in this act.

The language is not that of averment or even of recital nor in the way of a preamble. It is not stated in such a way as in a pleading

would make it traversable. It is nothing but descriptive or bare recognition. The substantial matter of the act is plainly and simply to provide for a "*defacto*" state of things without thereby even intending to express an opinion as to whether or not it was "*dejure.*"

When Congress passed an act for the return of fugitive States did it intend *thereby* to legalize the institution of slavery, or to have such act regarded as an authority for such institution? Was the constitution, which recognized as an existing fact this institution, ever supposed to be the authority for it, or even as a justification for it? Neither can the act of 1848 be regarded as the authority for retrocession, for it does not enact any such thing.

I have stated that the fact of retrocession was not as positively stated in the act of 1848 as it would have been if by way of recital or preamble. Suppose it was recited as follows:

"Whereas Alexandria has been retroceded to Virginia and said State has thereby acquired jurisdiction over the same" would it not be more explicitly stated, then it now is? But even in such cases what say the authorities?

In Regina vs. Inhabitants of Haughton, 1st Ellis and Blackburn's Rep. 514 an indictment and judgment had been made for nonrepairs of two highways in the township of Denton. It was claimed that these highways were not in Denton. An act of Parliament had declared that the inhabitants of Haughton "shall continue liable to to the repairs of the said portions of the two highways in Denton." Another statute had recited this act. The court held that the judgment operated as an estoppel against showing that the highways were in Denton but say.

"The defendants rely upon two acts of Parliament in which this road is described as being in the township of Denton. But this is a mere recital in the first act of Parliament, which is repealed by the second. At most therefore it may be considered evidence that the road is in Denton, but against the evidence estoppel evidence cannot be admitted. Had there been anything amounting to an *enactment* that the road should be considered in Denton, this would have prevailed over the estoppel, but a mere recital in an act of Parlia-

ment, either of fact or of law is not conclusive, and we are at liberty to consider the fact to be different from the statement in the recital."

In the course of the argument Lord Campbell, interrupting says "Sometimes bad law has been recited in an act of Parliament but we are not bound by such recital."

In the King vs. Greene and others, 6 Ad. and Ellis 548 the syllabus is "The fact that Gateshead is mentioned as a "borough" in a statute and that in the same "boroughholders and freemen" of the borough of G. are mentioned in connection with it as a "corporate body" is not conclusive of the place having been a borough, or the boroughholders and freemen a municipal corporation before the statute." In this case the parties had acted as a municipal body for a long time, having a full set of officers &c. but it was held not a coperate body, because there was no royal grant, charter, or statute constituting it as such.

The preamble to an act is no part thereof, but contains generally the motives and inducements thereof. Mills vs. Wilkins 6. Mod 62. The preamble cannot be used to supply matters not embraced in the spirit and meaning of the enacting clause. 3 McCord. 298.

In speaking of the preamble to the constitution in Story's Com. Sec. 461 the author says.

"The preamble never can be resorted to, to enlarge the powers confided to the general government or any of its departments; it cannot confer any power *per se*. it can never amount by implication to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution." (See also Potters Dwarris on Statutes p. 108.

In 12 Wh. 136 this court says "A mistaken opinion of the legislature concerning the law does not make the law" although in that case the claim was sustained on the ground that considering the whole act there was sufficient to constitute an enactment of itself.

In the State against Miller 23 Wis. it was claimed that the statute did not confer jurisdiction upon justices of the peace to try certain offences against a corporation. The statute did however provide forms and modes of proceedings before them and for process for enforcing their judgment.

The court say "Even though on unfounded assumption by the legislature that a particular jurisdiction existed might not alone be sufficient to create it yet where the jurisdiction is assumed to exist and *explicit provision made as to the form and mode of its exercise* the authority to proceed in that form carries with it by necessary implication jurisdiction of the proceedings"

It will be observed that the implication here mentioned is entirely derived from the act itself and the terms of the act were regarded as conferring jurisdiction. But it seems to be conceded that the mere *assumption* that such jurisdiction existed was not sufficient to create it.

These cases show conclusively that it is only the enacting portion of Statutes that makes them operative, and that recitals, preamble, and words merely of opinion, or descriptive, have no force, in and of themsetves in any cases whatever. No implication can result from them only by way of explanation, and not as any source of authority

This being so in ordinary cases, how much mere clearly is it so when we in addition apply the well known principles in regard to grants from the government or in regard to statutes, affecting the interests of the government.

As to grants by individuals the construction and implications are most strongly against the grantor, but as to grants by the government, it is the other way.

"Public grants convey nothing by implication, they are construed strictly in favor of the king." United States vs. Arrredondo 6 Peters 738.

This doctrine is elaborately stated and approved in Charles River Bridge vs. Warren Bridge, 11 Peters 420.

In the case of the Brighamton Bridge, 3 Wall. 75, this court says "The principle is this, that all rights which are asserted against the state must be clearly defined and not raised by inference or presumption."

In Jefferson Branch Bank vs. Skelly, 1 Black 446 the court says "Neither the right of taxation nor any other power of sovereignty

will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."

The statute of limitations does not affect the government, unless it is expressly named. It needs no exception, U. S. vs. Hoar 2 Mason, 311; 18 John. 227. Nor the bankrupt act, 4 Mason 431, 4 Cowen 143; 14 Peters 315.

"The general words of a statute ought not to affect its rights, unless the constitution be clear and indisputable from the text of the act." 9 Gill. Md. R. 105.

" Acts of parliament which would divest or abridge the king of his prerogative in the slightest degree do not in general extend to and bind the king, unless there be express words to that effect." Chitty on Prerogatives Ch. 15.

" Royal grants are always void where the king evidently mistakes his title in a material point to the prejudice of his tenure or profit." (Chitty on Prerogatives Ch. 16 under head of Recitals.)

In this respect the people of the United States stand in the place of the King. 14 Peters 315,

Such being the well settled principles relating to statutes affecting in any way the rights or interests of the government, as shown by an immense number of cases cited in the above authorities, what shall be said when the subject of consideration contended, for is a grant of an important portion of political sovereignty, the giving away, without consideration, of nearly one-half of the seat of government itself, which was explicitly and expressly committed to Congress by the constitution itself, the divesting from the United States that power of exclusive legislation which the constitution says, Congress *shall have* over the territory which has once become the seat of Government?

It was at one time strongly contended that the granting of charters to corporations was giving to them a portion of the sovereignty of the government. But it was settled in McCullough vs. Maryland, that this is only a mode of exercising sovereign power and not a grant of such power. In State Bank of Ohio vs. Knoopp, 16 How. 389 the question was, whether the legislature could exempt a corpora-

tion from taxation, and it was claimed that this was yielding up some portion of sovereign power. Held that the charter being a contract it was only an exercise of sovereign power, but it was conceded by all that no portion of sovereign power could be actually given up. Judge Taney says. "It is said that the state cannot barter away any part of its sovereignty, no one ever contended that it could."

In 16 How. 431 the court says. "One legislature cannot by its own act disarm its successor of any of the power confided by the people to the legislative body, unless they are authorized by the constitution under which they are elected to do so."

The constitution expressly provides for the cession of jurisdiction by the States to the United States. for certain purposes enumerated. But in such cases their cession must be expressly made.

"To take away the jurisdiction of the state courts within state territory ceded to the United States, such jurisdiction must be expressly surrendered by the state." In Re Carlton 9 Cowen 471.

Such cession cannot be implied from long acquiescence, nor legislation assuming such cession to have been made. People vs. Godfrey 17 John.

Even where such cession had been expressly made by the state, it was not complete without an act of Congress accepting the same (Lent's case 2 Wheeler's Cr. cases 548.)

In relation to acts of Parliament, which is omnipotent, the court say in the case of the Elsebe, 5 Rob. R. 573.

"Government does not mean to divest itself of the attribute of of sovereignty, unless it is so clearly and unequivocally expressed. Sovereignty is not held by the sovereign as private property, and no alienation shall be presumed except that which is clearly and unequivocally expressed."

In view of all this who will be bold enough to assert that the county of Alexandria has been retroceded by implication from the legislature upon the subject?

It may be suggested that the assumption upon which Congress acted will operate as an estoppel. There are several answers to

this. An estoppel occurs only "where a party has conveyed a precise and definite legal estate or right by a solemn assurance which he will not be permitted to deny. It should be certain to every intent, and therefore, if a thing be not *directly* and precisely alleged it shall not be estopped." 10 How. 267.

The principle of estoppel does not apply where the grantors are *trustees for the public.* 2 Term. Rep. 171.

Estoppel does not apply where it is alleged by way of argument or inference, *nor where the truth appears by the same record* Comyn's Digest Estoppel.

This last principle is clearly applicable to the assumption in the act of 1848. It is expressly based upon the operation of the act of 1846, which we assume to be void, which as a matter of law, all are bound to know to be so. The whole of the act of 1848, is expressly and upon its face based upon the validity of the act of 1846, to which it is supplemental, and if that falls why does not this fall with it?

The act of retrocession recites no consideration. There was none. Virginia has lost nothing by acting upon it. If it were otherwise she might plead an estoppel or assert her claim with better grace. The original cession to the United States *was* upon a consideration and having derived the full benefits contemplated she has now no moral or equitable claim upon this territory.

Need it be further argued that Virginia cannot sustain its jurisdiction by acquiescence on the part of the United States, or by prescription?

Legislation is not accomplished by acquiescence. Certainly sovereign rights and powers are not thereby divested.

It is a maxim that the king can be guilty of no laches "*Nullum tempus occurrit regi.*" A prescription is not good which runs against the king's right. Com. Dig. Tit. Prerogative. Bacons Abr. Tit. Prerogative.

An individual does not even lose his title to his real estate by acquiescence except by express statute under certain circumstances thereby described and then for more than twenty years in most of the States.

In the state of West Virginia vs. Virginia, 11 Wall. It was held that the consent of Congress was to be implied from its

enactment upon the subject to the proposition that the two counties of Berkeley and Jefferson might determine by vote to which state they would belong, although this proposition was not expressly named in such enactment. But this was placed upon the ground that the constitution of the state and a statute of Virginia, containing this provision were before Congress, and in admitting the state with this provision in the constitution Congress must have had it in view.

The subject matter of the controversy was, what was embraced within such consent, not whether a consent had been given. In this respect it was like matter of description as to what is contained within a grant or conveyance, The implication thereby sustained derived from the act itself and the subject matter of the consent. It was not derived from inference from legislation upon other subjects or from legislation merely relating to the subject.

Besides the consent therein refered to had no relation to anything like a grant from the government and was not claimed to affect the title or interests of the United States in any manner.

In regard to the First section of the Revised Statutes relating to the District of Columbia, it may be said in addition to what has already been said.

That it can have no effect in this case for the further reason that Sec. 5596 of the Rev Statutes which is made applicable to the District of Columbia, declares that " All acts of Congresspassed prior to Dec. 3d, 1873, no part of which are embraced in said revision, shall not be affected or changed by its enactment." Congress did not intend by revising the statutes to enact any new legislation, and though by a change of phraseology it may have done so in some instances in regard to those acts, parts of which were embraced in such revision and to which therefore the attention of Congress was directed, yet as to such acts no parts of which were embraced therein and to which therefore its attention was not directed. it is expressly declared that they shall not be changed or affected. The true intent and meaning of Sec. 5596, is that if there should be any conflict between the phraseology employed in any portion of the Revised Statutes and such acts no parts of which are embraced therein, those acts should control, and should not thereby be changed or affected.

It will be observed that this section only purports to describe the

boundaries of the District of Columbia. It does not purport to define the limits of the seat of government, nor to yield the jurisdiction of any portion of it to Virginia. Virginia would have no more claim to it than any other state, except by express cession to it.

We claim therefore, that the retrocession of Alexandria to Virginia was beyond the constitutional power of Congress, that the act of 1846, was unconstitutional for the further reason that it was an attempt to delegate legislative power, and that this being so, whatever may be the constitutional power of Congress, such retrocession has not been accomplished by any implication from legislation, or acquiescence, or recognition, on the part of the United States.

W. WILLOUGHBY,

Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

No. 186.

PHILIPS vs. PAYNE.

ERROR TO SUPREME COURT OF DISTRICT OF COLUMBIA.

Brief for Plaintiff in Error,

—BY—

SHELLABARGER & WILSON,
OF COUNSEL FOR PLAINTIFF.

WASHINGTON, D. C.:
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1876.

In the Supreme Court of the United States.

October Term, 1875.

No. 186.

ROBERT A. PHILIPS

vs.

CHARLES W. PAYNE.

On Error to the Supreme Court of the District of Columbia.

Brief for Plaintiff in Error.

The action below in this case, was to recover in assumpsit, taxes assessed by the Government of Virginia upon plaintiff's property in Alexandria, which it is admitted, was in the District of Columbia prior to the alleged retrocession of Alexandria to Virginia, by the act of July 9th, 1846. These taxes, so assessed, were paid by plaintiff under protest that the tax was illegal owing to the invalidity of that attempted retrocession, which he claims left his property in the District of Columbia where alone it is taxable. The assumpsit is to recover this tax back from the collector as illegally assessed and compulsively collected against plaintiff's protest; and this recovery is claimed by virtue of the law laid down in such cases as 5 Wall., 732; 10 Peters, 150; 13 Pet., 267; 12 Wall., 13.

The declaration sets up, in subtance, the above facts. It was demurred to, and the demurrer was, *pro forma*, sustained by the Court below; and the case is here upon error assigned on the ruling of the Court in sustaining the demurrer.

Several of the questions considered by our associate counsel we will leave wholly to his argument, and will confine this argument to some of what we deem the leading features of the case.

Delegation of Legislative Powers:

We go at once to the question of the validity of the act of Congress of July 9, 1846, attempting to retrocede Alexandria to Virginia. The only question relating to the validity of this act which we shall discuss, relates to the method of its passage and not to the power of Congress (in concurrence with the State of Virginia) to retrocede this territory. As to this last point we leave the case upon the very able argument of our associate. Assuming this power to exist in Congress, we inquire, has Congress exercised it in any constitutional way.

The first section of this act of July 9, 1846, provides "That *with the assent* of the people of the town and county of Alexandria, to be ascertained as hereinafter provided, all that portion of the District of Columbia." * * "be and the same are hereby ceded" * * * "to the State of Virginia."

Sec. 4 provides "That this act *shall not be in force until after the assent of the people* of the county and town of Alexandria shall have been given to it in the mode hereinafter provided." * * "And on the day and at the place so appointed every free white male citizen of the United States, who shall have resided therein for six months preceding the time when he offers to vote, insane persons and paupers excepted, shall vote, viva voce, upon the question of accepting or rejecting the provisions of this act." * * "If a majority of the votes so given shall be cast against accepting the provisions of this act, *then it shall be void and of no effect;* but if a majority of said votes should be in favor of accepting the provisions of this act, then this act shall be in full force."

It will be observed that this act, broadly, explicitly and in terms wholly unmistakable, submits to a vote of this county and town *the same precise question which the constitution compelled each member to vote upon in the passage of the act, and compelled the President to pass upon in approving the bill, to wit, "Shall the bill become a law."* The vote is not to be upon some distinct provision of the act—not upon the time of its taking effect—not upon whether it shall operate upon some special class, locality or sub-

ject-matter, and not upon another—not that the vote shall decide some local fact, contingency, event or condition outside of the wisdom of the law, and upon the decision of which outside fact the taking effect of the act was made to depend. But on the contrary, the vote was to be expressly on accepting or rejecting the provisions of the act. It is in one of its two alternatives the identical question, and put in the same words on which the member votes on a "motion to reject a bill." It is in the other alternative the same identical question put to the houses on the passage of every bill, "Shall the bill pass?" with the change of the word "pass" for the words "be accepted." Then it duplicates this provision, by saying this act shall not be in force until after the assent of the people, &c.,—no part of the act. Then it triplicates this provision by providing that if a majority of votes are against accepting (passing) the provision of this act, then it shall be void and of no effect—the entire act, in its totality, void and of no effect—no law. Precisely as in the case of Rice vs. Foster, (4 Harr., 493,) the Court said the case was one where a bill was submitted to part of the people to pass, so the same thing is done in the present case. In other words, this act, exactly and literally, lets out to a town meeting the entire powers, prerogatives, duties and discretions of the two houses of Congress and of the President of the United States in the matter of passing a bill into a law; and that a bill, too, of such supreme moment to the entire nation that the constitution refused to suffer Congress alone to control it, but took from Congress the control, first, of the question of whether there should be a seat of government; second, as to a cession by the States being requisite; third, as to its maximum size; and fourth, as to what jurisdiction it should be under.

The case, therefore, presents sharply the question whether Congress may let out the business of passing general statutes—of supreme and national concern—affecting, deeply, the entire nation to town meetings; or, if it be deemed that this statement is too strong, then we modify the inquiry, and say the question is "Whether Congress may add to the second clause of the 7th Sect. of the 1st Art. of the Constitution, (which permits no approvals of bills passed by each house except that of the President,) a provision by which bills shall not become laws, though of supreme and national concern, unless they shall be approved by *both* the President and the town meeting?"

The Policy Forbidding Delegation.

The policy prohibiting Congress from thus delegating its stupendous powers is most obvious. (Sedgewick, pp. 135–6–7,) thus states it: "Efforts have been made, in several cases, by State legislatures to relieve themselves of the responsibilities of their functions by submitting statutes to the will of the people in their primary capacity; but these proceedings have been held, and very rightly, entirely unconstitutional and invalid. The duties of legislation are not to be exercised by the people at large. The majority governs, but only in the prescribed form. The introduction of practices of this kind would remove all checks on hasty and improvident legislation, and greatly diminish the benefits of representative government."

The author might have added that it would *abolish* all the benefits of a representative government, as distinguished from a pure democracy; but leaving us the corruptions and resulting dangers incident to representative bodies acting outside of the restraints of oaths, constitutions and law. For an admirable statement of this view of the dangers of suffering delegation of legislative powers to popular votes, see Rice vs. Foster, 4 Harr., 485, 487.

If such be the mischiefs resulting from delegating to the *vast body of the people* the decision, as to what laws shall be law, what shall be said of the policy of suffering *seven hundred and sixty-three votes*, cast at a town meeting, to pass or veto a law of such vast moment to the entire nation that the Constitution itself has taken charge of the subject-matter thereof in nearly every important particular?

Authorities.

Assuming now, for the convenience of the argument—what we however deny—that Congress is *no more* limited in its power to make the taking effect or the passage of laws to depend upon popular votes than are State legislatures whose constitutions are silent on that subject, we now state the proposition of law we maintain on this point, which decides the invalidity of this act of Congress.

Where an act is a general one in its nature, and, like other general laws, affects the body of the people, it is unconstitutional to submit

to a vote of either, all or part of the people, the same question of the wisdom or policy of the law upon which the law-maker votes in the passage of the law, and to make the result of that vote the condition upon which the measure's becoming a law, is to depend.

In stating our proposition, as we have, we make it much more liberal in suffering popular votes in local and exceptional cases, than is warranted by the weight of authority and reason applicable to this matter. But we state it as we do because *it covers the law of the present case;* and because there is not an authority of value in the world, which does not support this proposition as we have stated it.

We now refer the Court to some of these authorities:

The constitutional principle which lies at the foundation of our proposition, and of every case on the subject, is that, "*Important legislative functions are wholly incapable of being delegated.*"

IN WAYMAN VS. SOUTHARD, 10 WHEAT., 42:

Chief Justice Marshall states this law in these words: "*It will not be contended that Congress can delegate to the Courts or to any other tribunal powers which are strictly and exclusively legislative.*" * * * In speaking of the line between powers "strictly and exclusively legislative," and those not so, and which come under such heads as ordinances, by-laws, rules of Court, regulations and the like, he adds, in the same case, page 43: "The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made, and the power given to those who are to act under such general provision to fill up the details."

Whilst, therefore, this line between "*those important subjects*" incapable of delegation, and those "details" which may be entrusted, under general provisions, is not exactly drawn, yet this authority, before which we all bow, announces not only that there *is* such a line, but also announces that "*it will not be contended that Congress can delegate*" * * "*powers which are strictly and exclusively legislative.*" That what shall be the minimum size of the seat of government of this nation is not a "*detail*" which may be delegated to the Courts, or head of a department, or common council, or 763 votes in Alexandria, is so palpable, by common

sense and the letter of the Constitution, as to be as wholly incapable of proof as are the axioms in mathematics. The very letter of the Constitution says that it must be the "acceptance" of CONGRESS and the cession of States that shall fix the size (not exceeding ten miles square) of the Seat of Government. To enact that the Secretary of the Interior or the town of Alexandria is hereby authorized to make regulations fixing the dimensions of this district would, of course, be simply preposterous.

We start, therefore, in this citation of authorities, with Marshall, declaring, from the bench where you sit, that this affair of supremest moment "NO ONE WILL CONTEND CAN BE DELEGATED TO ANY OTHER TRIBUNAL." But the act in question exactly and literally did delegate the passage of the entire body of a law, fixing the size of this seat of government, to 763 voters in one corner of this district! And they—not Congress—passed; and they—not the President—approved the law, in its final enactment.

COOLEY CONST. LIM., 117:

"*One of the settled maxims in Constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority there it must remain; and by the Constitutional authority alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the wisdom, judgment and patriotism of any* OTHER *body for those to which alone the people have seen fit to confide the solemn trust.*"

Such is the opening proposition, under this head, of this author. He states then, the cases which do not come within this prohibition; and, after saying that "*whether a county or township shall be divided, and a new one formed, or two townships or school districts, formerly one, be reunited, or a county seat located at a particular place, or, after its location, removed elsewhere, or the municipality contract a particular debt or engage in a particular improvement, are always questions which may, with propriety, be*

referred to the voters of the municipality for decision," and after presenting some views as to the place of the dividing line referred to in the above quotation from Marshall, C. J., he then adds the following as to what the weight of authority is touching what laws may and what may not be made to depend on being adopted by a popular vote. He says, (page 120:)

"If the decisions of these questions is to depend upon the weight of judicial authority up to this time, *it must be held that there is no power to delegate the adoption or rejection of a general law to the people of a State* any more than there is to refer it to any other authority."

Quoting from Locke on Civ. Govt., § 142, the author adds, in his note 1, p. 117, these words: "The legislature neither must or can transfer the power of making laws to any body else, or place it anywhere but where the people have."

IN SANTO VS. IOWA, 2 IOWA, 165,

the last sect. of the act, (see 2 Iowa, 207,) provided a popular vote of the State for and against a prohibitory liquor law, and that if the majority was for such a law then the act to take effect July 1, 1855; but the part as to election to take effect on publication. On page 207, Court says: "Now it is manifest there is no distinct submission to the people of the question whether this act shall or shall not become a law as in the New York cases;" and the Court holds that since this was not an attempt to submit to the people the question of the act becoming a law, and that the 18th section could be severed from the rest of the act, therefore this 18th section could be and was held void, and the residue of the act was allowed to stand. But the Court show with great force of reasoning, (see pages 203–207,) precisely what we here claim, that the Legislature "cannot legally submit to the people the proposition whether an act shall become a law."

IN BARTO *vs.* HIMROD, 4 SELD., 483,

was a case where the 10th sect. of a *general* free school law provided that the electors of the State should determine by bollot, at the next annual election, whether the act should become a law; and the Court of Appeals held that the law having never been passed by the legislature—the only body under the Constitution that was competent to pass a law—it was void and of no effect.

As this is a leading case in America, is everywhere relied on as such, and its reasoning has become the text of our hand books, we beg attention to some of its features. The 10th sect. of this school law read as follows: "*The electors shall determine by ballot, at the annual election, to be held in Nov. next, whether this act shall or shall not become a law.*" The 14th sect. read as follows: "*In case a majority of all the votes in the State shall be cast against the new school law this act shall be null and void; and in case a majority of all the votes in the State shall be cast for the new school law, then this act shall become a law; and shall take effect,*" &c.

In regard to the nature of the condition on which the going into effect of an act may be made to depend the Court (p. 490) says, "The event or change of circumstances on which a law may be made to take effect must be such as in the judgement of the Legislature affects the question of the expediency of the law: an event on which the expediency of the law, in the judgment of the law makers, depends. On this question of expediency the Legislature must exercise its own judgment *definitely and finally.* When a law is made to take effect upon the happening of such an event, the Legislature, in effect, declare the law inexpedient if the event should not happen; but expedient if it should happen. *They appeal to no other man or men* to judge for them in relation to its present or future expedie ncy. They *exercise that power themselves,* and then perform that duty which the Constitution imposes on them. But in the present case no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the free school act, abstractly considered, did not depend on the vote of the people. If it was unwise or inexpedient before the vote was taken it was equally so afterwards. The event on which the act was made to take effect was nothing else than the vote of the people *on the identical question which the Constitution makes it the duty of the Legislature itself to decide.* The Legislature has no power to make a statute dependent on such a contingency because it would be confiding to others the legislative discretion which they are bound to exercise for themselves, and which they cannot commit to any *other man or men* to be exercised. They have no more authority to refer such a question to the whole people than to an individual."

Ruggles, C. J., 1853.

Notice the parallel this act of New York presents to the one in question.

By that of New York it was provided "the people shall determine by ballot whether this act shall or shall not become a law." Ours says, "That this act shall not be in force until after the assent of the people" by a popular vote. No part of the act, observe, shall be in force, that is be law.

Then the New York act says, in case a majority vote against the law, then "this act shall be null and void." Ours says that in case a majority vote "no," then this act "shall be void and of no effect."

The New York act says, if a majority vote for the law, "then this act shall become a law and take effect."

Ours says, if a majority be in favor of accepting the provisions of this act, "then this act shall be in full force."

Observe that in each case no part of the act—neither that as to casting the vote or any other—was to be in force until after the vote. Observe that in each case the favorable vote is that which was a condition precedent to any part of either act becoming a law. And observe, also, that the negative vote defeated every part of the act from ever going into force as a law.

But here the parallel ends. In the New York case, every elector subject to the proposed law, or in any way affected by it, became entitled to vote upon it, and yet that vote of all the people could not make it law. But in the case at bar, only a small fraction of the people of the district were suffered to vote; and about one in ten thousand of the electors, who are alike interested in their seat of government, were suffered to vote.

PARKER VS. COMMONWEALTH, 6 PA. ST. R., 507:

Presented the question whether, where a general law provided that the citizens of certain counties should decide by vote whether the sale of vinous and spiritous liquors should continue in such counties, it was a law; and the act was held unconstitutional and void.

The case is ably reasoned, and on pages 515, 519, will be found a strong statement of the policies and principles on which rest this constitutional prohibition against the surrender, by the legislature, of its power to make the laws, to popular votes. A re-

mark on page 515 and 516 has special application to the case at bar. It is in these words: "It is a duty, therefore, which cannot be transferred by the representative—not even to the people themselves; for they have forbidden it by the solemn expression of their will that the legislative power shall be vested in the General Assembly. *Much less can it be relinquished to a* portion of the people who cannot even claim to be the exclusive depository of that part of the sovereignty retained by the whole community."

On page 518, after an analysis of the statute showing when it was to become operative as a law in certain counties as the result of the local vote, the Court makes some comments having much and direct force as applied to the present case. Speaking of the act and the popular vote, the Court says: "Possessing no innate force, it" (the act) "remains a dead letter until breathed upon by the people, and called into activity by an exertion of their voice in their primary assemblies. Until then, it prohibits no act, creates no offence, points out no mode of trial, fixes no penalty; and when so bidden into life, its existence, as a rule of action, is limited to the brief period of a single year, unless new energy is again infused through the medium of the ballot-box." * * * "It operates not *propria vigore;* but, if at all, only by virtue of a mandate expressed subsequently to its enactment, in pursuance of an invitation given by the legislative bodies. As it left the halls of legislation it was imperfect and unfinished, for it lacked the qualities of command and prohibition absolutely essential to every law. We have seen that there can be no such thing as law unless it be mandatory and obligatory upon those who are the subject of it by a declaration of the legislative will. From whence does the law of 1846 derive its mandatory character? Not from the legislature, for in the day of its enactment, it possessed it not. If it have that character at all, it must has been conferred by the *fiat* of a portion of the people expressed through their votes," &c.

Bell, 1847.

IN STATE VS. SWISHER, 17 TEXAS, 447.

The judge, in deciding an act unconstitutional, which was to become a law upon being approved by a vote of the people, makes the following statement as to the state of the authorities

at the date of this decision, (1856:) "*It is admitted by the Attorney-General that in most of the States, (perhaps all but Vermont,) these acts have been adjudged by their Courts unconstitutional.*"

RICE vs. FOSTER, 4 HARR., DEL., 479:

Is a case where, in 1847, the legislature attempted to provide that if, at a named election, a majority of the votes of any county voted "no licence," then there should be no licence in such county; and if the majority were the other way, then the existing law allowing licence was to be in force.

In deciding this act to be wholly void, three separate and very able opinions are delivered by the Chief Justice, the Chancellor and Justice Harrington, respectively. The case is valuable for its presentation, historically and otherwise, of the dangers the framers of our Government saw and meant to avoid, to be apprehended from delegation of legislation to popular votes, or from a pure democracy, (pp. 485, 487.) It is also valuable as discussing and presenting the distinction between laws made to depend, as to taking effect, upon some extranious fact, contingency or condition, such as appears in the non-intercourse act of May 1, 1810, and such acts as the one at bar where the condition was a popular vote on the *identical* question of the wisdom of the measure on which the two houses were required to vote, to wit, shall the bill become a law? (See pp. 493, 495; also 499, 500.)

The case of Shenango vs. Brown, 26 N. Y., at pages 472–3, contains a good statement of the distinction between acts which suffer particular localities or corporations to avail themselves by vote of the provisions of a particular law, and those acts which attempt to leave to the popular vote the question of "law or no law." The court there say "The case of Barto vs. Himrod," (4 Seld., 483,) "*decided that the legislature does not possess the power to submit to the people of the State the question whether an act shall or shall not become a law, or to pass an act to take effect upon the happening of a future event, unless they determine for themselves the expediency or inexpediency of the law in the supposed event. They cannot delegate to the people the power to vote on the precise question which the Constitution makes it their duty to decide, that is the expediency of a given law. In other words an*

act cannot be passed to take effect if the people of the State shall vote that they think it ought to do so."

The court then proceeds to point out the distinction between such attempts as these to delegate legislation, and cases like that before the court, and others there commented upon, where laws take effect as laws independently of the wish of the people, but under which localities may decide by vote whether they will avail themselves of a power conferred by such act.

The case of Bull et al. vs. Read et al., 13 Grat., 78, relied upon on the other side, was a case where, by a local law a district in Accomac county, was formed into a separate free school district. Its second section provided for a vote of the district for or against forming a separate school district; and the 4th Sect. provided that if three-fifths of the votes were for the organization of the school in such district, then such organization might be formed and certain tax assessed therefor, &c.

The ground on which this act was claimed to be valid is stated by counsel, on page 85, in these words: "There was nothing in this act which was not done every day in the creation of corporations for useful, public and private purposes. The act was passed by the General Assembly, and became a law by its terms from its passage. The people were not authorized to say whether it should be a law; but whether, it being a law, they would accept its provisions made solely for their benefit. What the people were to do was precisely what is to be done by those interested in every case of a charter of incorporation granted by the General Assembly."

And the court sustained this act, remarking on page 88: "In regard to many measures, *especially those of a local character*, it might be eminently just and proper that before they should be actually enforced, the wishes of a majority or some other portion of those who are to bear the burdens and reap the benefits, if any, should be ascertained in some reliable form." Now, whatever *dictum* may be found in this case, it is perfectly palpable that the decision does not even *approach* to a similarity to the Constitutional question involved in the case at bar.

The case of McLaughlin vs. Bank of Potomac, 7 Gratt., 68, cited for defendant, is no authority whatever on the question we here consider, for the simple reason that the question of the inva-

lidity of the act of 9th July, 1846, on the ground that it was never passed by Congress, but its passage delegated to a vote of Alexandria, was never either made, mentioned, thought of or decided in that case.

No Local Law.

The force of what is now found in the authorities cited may be resisted on the claim that this act of 9th July, 1846, is but a local law, affecting no body but them whom it purported to retrocede to Virginia; and that since such local questions—like the questions of creating a new county, taxing a definite locality for a specific improvement, &c.—may be left to local votes, therefore this may be so left.

We have already alluded to what seems to us an unanswerable reply to the claim that the size, location, or any other quality of the seat of the national government is a matter of mere local concern. This reply we find in the very text of the Constitution. It has not left even to Congress and the President, as the law power of the nation, this affair of the seat of Government, but has guarded it all around and throughout with the extremest solicitude as being one of such transcendent moment as to demand the care of the organic law. And to impress upon the Court how eminent is the national magnitude of an act affecting the size of this district, as that question is viewed by the Constitution, suffer us to remind the Court of that class of things on which the Constitution is wholly silent—which it has treated as of *less* moment than the size of this district by being wholly silent in regard to them. Mr. Story has said in speaking of the Constitution, "Its nature, therefore, requires that only its great outlines should be marked—its important objects designed, and the minor ingredients which compose those objects be deduced from the nature of those objects themselves." Mark what some of those "minor ingredients" are which, unlike the matter of the size of this district, are left unnamed by the Constitution and are to be found only among its implied powers. There is in the Constitution no express provision as to what the departments of this governments shall be—none which enables the United States to sue in the courts—none which authorizes it to make a contract—none which authorizes it to erect a fort or light house or magazine or any public building, or to improve a harbor or survey any coast—nor which authorizes Congress to define and

punish any crime save two enumerated, to wit, piracy and offences against the law of nations, (6 Wheat., 233)—nor to administer oaths—none to make a military or naval academy, and none in regard to scores of other great functions now in daily exercise by this government.

Such are some of the powers of this government which the Constitution not only left wholly to Congress but left unnamed and to be implied from the powers granted. But here is a subject treated by the Constitution as so pre-eminent in its national magnitude as to be hedged all around by the Constitution itself. And the adoption of this clause was no accident. The spectacle of a Congress, surrounded, in Philadelphia, by a mob, appealing to Pennsylvania for succor, the succor denied, its flight to Princeton, and thence to Annapolis—a fugitive without a home, a seat or the power of self-defence, added to the self-evident necessity of placing the seat of national authority under national sovereignty and away from State control, compelled the framers of the Constitution to see to it that the national Congress should not only be the masters of their own home, but that such home should have such a government as would exclude the power of the States from such place as should become the seat of government. To the views of Story (2 Com. on Const., § 1218—1219) we beg this Court's attention as indicating how far the question of the size and jurisdiction of this district comes from being a mere *local question* of no moment to this nation; and one to be decided, like the erection of a county court house, or the construction of a market house, by town meetings.

Cession by Implication.

Assuming now that the act of July 9, 1846, is wholly void, we turn to the inquiry whether any *other* events have happened by which the exclusive sovereignty of Congress over the county of Alexandria has been parted with and that county made part of Virginia.

Besides the act of July 9, 1846, it is not claimed that any act of Congress was ever passed *expressly* retroceding Alexandria, nor that any one has been passed, accomplishing, in any *direct* way, the matter of such retrocession.

No act of Congress bearing even indirectly on that question has been passed except such as that providing for courts in Virginia.

The act of July 5th, 1848 (9 Stats., 244) providing for the business pending in the courts at the date of the act of 1846, and the one of 1871, defining the boundary of this district. The question we now come to is whether this district may be retroceded without any act in which the mind and purpose of Congress is expressed making the retrocession.

We deny that the seat of government of the United States can be changed, abandoned or cut down in territorial extent by mere *implication*, and assert that if the change be constitutionally possible at all, the cession can only be made by act of Congress, in the enactment of which the mind of the legislator assented and voted for the *very act and fact of cession.*

This very question arose in the case of

PEOPLE *vs.* GODFREY, 17 JOHNSON, 225.

In that case the question was whether fort Niagara, in New York, had so passed under the exclusive jurisdiction of the United States, under the same clause of the Constitution which gives exclusive jurisdiction over this district—in other words, whether Fort Niagara was a "place purchased by the United States with the consent of the legislature" of New York. The case arose in 1819; and the New York legislature, April 6, 1803, had passed a law which expressly "authorized the Governor of New York to agree with such other persons as shall be authorized by the United States for that purpose, for the sale of such quantities of land adjoining Fort Niagara as shall be necessary for the accommodation of that fort, and to cede the right of the people of this State to said lands to the United States."

The post within which the act occurred which raised the question of jurisdiction was a military fort before the revolution, was surrendered to the occupancy of the United States by the treaty of peace, was ever after held by the United States exclusively as such post, and the lands where it is were by three successive treaties between the United States and "the Six Nations" ceded to the United States. (See 1 U. S. Stats., 307 to 314.)

No express action was taken by the Governor or people of New York under the said act of 1803, but the Chief Justice says that "it is argued" (p. 230) "that the State, though they have made no cession have tacitly consented by necessary implication from the act of 1803, that the United States should hold the fortress of Ni-

agara." In reply to this claim the Court says, "We regard it as a fundamental principle that the rights of sovereignty are never to be taken away by implication. In the case of United States *vs.* Bevans, Marshall, Ch. Justice, said: 'The power of exclusive legislation under the 8th Sect., 1st Art. of the Constitution—which is jurisdiction—is united with cession of territory which is to be the free act of the States.' The correctness of this remark is fully admitted; and if the United States had the right of exclusive legislation over the fortress of Niagara they would also have the exclusive jurisdiction. But we are of opinion that the right of exclusive legislation within the territorial limits of a State can be acquired by the United States only in the mode pointed out by the Constitution, to wit, by "the consent of the Legislature of the State in which the same shall be, for the erection of forts," &c. "The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by dissezin of the State. Much less can it be acquired by mere occupancy with the implied or tacit consent of the State when such occupancy is for purposes of protection."

Here then we have a case, arising under the same clause, now involved, of our Constitution, in which the question was had New York ceded her sovereignty over this post to the United States. She had, nearly a quarter of a century before the case arose, *expressly* enacted that her governor might make the cession. The lands themselves, as property, had ever been held by the United States; had been three times over ceded to the United States, and the occupancy and government of them had, from the revolution down, been held *exclusively* by the United States; and on these facts it was earnestly pressed, in that case, that there arose an *implied* cession by the State to the United States. But the Court replied "no;" and said: "We regard it as a fundamental principle that the rights of sovereignty are never to be taken away by implication."

So that, really, in that case, the sole question was, can sovereignty be parted with by a State by mere implication? The case decided that it could not be; and this case has been ever since followed as a leading one in every other cause which has arisen in this Union.

Public Grants Never Presumed.

The principle so strongly stated in this case, last cited, of The People vs. Godfrey, that rights of sovereignty are never allowed to be taken away by mere implication, rests upon a principle which is irresistably established in the laws of all nations, but in none more firmly than in the decisions of this Court. It is the principle stated in Charles River Bridge vs. Warren Bridge, 11 Peters, 546, "*that in grants by the public nothing passed by implication.*" On page 548, in speaking of this principle of construction of all public grants which allows nothing to pass by implication, the Court says: "Whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same princi. ple" (that nothing passes by implication) "applies, and the rule of construction must be the same."

The case of United States vs. Hewes, Crabb, 307, decides that no general words of an act shall take away any rights of the Government unless such construction "be *clear* and INDISPUTABLE UPON THE TEXT OF THE ACT, (page 318.) And these words of Judge Hopkinson are the quoted words of Story, judge, as found in United States vs. Hoar, 2 Mason, 314, 315, where he says: "It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the Government or *affect its rights*, unless the construction be *clear and indisputable* upon the text of the act." Chancellor Kent, (1 Kent's Com., 460, 3d Ed.,) declares, "It is likewise a general rule in the interpretation of statutes limiting rights and interests not to construe them as so to embrace the sovereign power of the Government, unless the same be *expressly named* therein, or included by *necessary* implication." And see the numerous cases cited in United States vs. Hewes, Crabb, 311, 319. These cases all rest on precisely the same principle so elaborately considered in the Charles Riv. Br. case, 11 Peters, to wit, that the rights, powers and prerogatives of the Government, are never surrendered or lost by implication.

Substantially the same thing is held in Mills vs. St. Clair County, 8 Howard, 581, and in the many cases cited by the Court in 11 Peters, 546, &c. But it is unnecessary to multiply author-

agara." In reply to this claim the Court says, "We regard it as a fundamental principle that the rights of sovereignty are never to be taken away by implication. In the case of United States *vs.* Bevans, Marshall, Ch. Justice, said: 'The power of exclusive legislation under the 8th Sect., 1st Art. of the Constitution—which is jurisdiction—is united with cession of territory which is to be the free act of the States.' The correctness of this remark is fully admitted; and if the United States had the right of exclusive legislation over the fortress of Niagara they would also have the exclusive jurisdiction. But we are of opinion that the right of exclusive legislation within the territorial limits of a State can be acquired by the United States only in the mode pointed out by the Constitution, to wit, by "the consent of the Legislature of the State in which the same shall be, for the erection of forts," &c. "The essence of that provision is that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by dissezin of the State. Much less can it be acquired by mere occupancy with the implied or tacit consent of the State when such occupancy is for purposes of protection."

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ity on a point like this where there can be no controversy about the law.

Since therefore the surrender of the supremely important prerogatives of the Government over its own seat, and the surrender of a large part of the seat itself, will never be presumed nor got by mere construction, nor be allowed to occur by mere implication from some law, where manifestly the mind of the lawmaker never ever touched the question of the *wisdom or policy* of making the cession; therefore no act passed since 1846 can have any effect in parting with this District.

If it should be argued that even granting the act of July 9 to be void, yet the Legislature of Virginia, asking and accepting the retrocession, and of Congress of the 5th of July, 1848, providing for certifying to the Virginia Courts causes decided in the Supreme Court, create and constitute a compact between the United States and Virginia, whereby the territory of Alexandria County and the sovereignty thereon are restored to Virginia, then we think the conclusive answer to the claim of such compact working such result, is to be found in the authorities we cite, showing the two things, namely: 1st, That grants by Government of any of its powers or rights, are never made by or gotten from implication, and only are allowed when clearly and expressly made.

And 2d, That laws which mistakably *assume* a state of law which does not exist without containing enacting terms competent to *create* that law so mistakably assumed, never are allowed to create the state of law so wrongly assumed. This being incontestably the law on these two points, it becomes, we think, wholly impossible to hold that the act of 5th July, 1848, which contains not a word, syllable or thought which can be construed into actually making the retrocession, and only alludes to the retrocession as accomplished by former legislation, shall be construed to itself, make a retrocession or a compact for a retrocession. It is patent on the face of this act that the mind of the legislator was not called to deal with or assent to the policy of retrocession, and did not assent to or vote upon it at all. And it is certainly impossible to hold, that when the law is that in *no* case will a mistaken assumption by the legislature as to what the law is be allowed to make law, a mistaken assumption about the sovereignty of this Government over its own seat having been previously parted with,

shall make a grant of that sovereignty, when the law forbids its being parted with except by the most unmistakable words making this grant. Therefore no compact creating a grant can be *implied* when there is no valid law either creating the grant or creating a compact looking to or making the grant. We now present some further authority as to this point.

LAWS ASSUMING ALEXANDRIA RETROCEDED DO NOT WORK A RETOCESSION.

To the same effect, and arising out of the same legal principle as that on which The People vs. Godfrey, 17 Johnson, 225, held that the principle was fundamental that "rights of sovereignty are never taken away by implication," is the rule that mistaken assumptions contained in the body of statutes touching the state of the law, do not make the mistaken assumption to become law.

The cases holding this are numerous and conclusive. In King vs. Green *et. al.*, 6 Adol. and Ellis, 548, (33 Eng. C. L., 145,) by an act of 5 and 6 of W., 4, "the borough holders and freemen of the borough of G., are mentioned in connection with it as the corporate body;" but the fact being otherwise, the Court refused to recognize them as such "corporation." In Regina vs. Houghton, 1 Ellis and Black., 501, 516, (72 Eng. Com. L., 514,) two acts of Parliament declared a certain road to be in the township of Denton, and it was hence claimed this *made* it so in law, though the fact had before been otherwise; but Lord Campbell, J. C., said, "Had there been anything amounting to an enactment that the road should be considered in Denton, that would have prevailed over the estoppel," (of a judgment finding the fact otherwise,) "but a mere recital in an act of Parliament, either of fact or law, is not conclusive; and we are at liberty to consider the fact or the law to be different from the state of the recital."

In Postmaster-General vs. Early, 12 Wheat, 148, Chief Justice Marshall declares the same thing, that "*a mistaken opinion of the legislature concerning the law does not make law;*" but adds that "if this mistake is manifested in words *competent to make the law* in future, we know of no principle which can deny them this effect." We have, in other connections, shown that no legislation subsequent to 1846, has been found which is "*competent*" to grant the sovereignty of the United States over Alexandria.

From what these cases, and many others like them establish, our application of their principle to this case is—

That since the act of retroceding the sovereignty of the United States over all or part of the seat of Government cannot be accomplished by mere *implication*, but (if constitutionally possible at all) can only be done by express and positive law, *directly* making the grant, and in the making of which the mind of the legislator shall *appear* to have assented to and voted upon the very fact of retrocession, therefore all subsequent laws which do not purport to make a retrocession, but simply deal with such retrocession as an already accomplished fact, do not *make* such retrocession, but leave the District as first formed under the Constitution.

Suppose, at the date of the act organizing the territorial government for this District in 1871, no act had ever been passed attempting to retrocede Alexandria, would it be pretended that the fact that the said act of 1871 gave the District a boundary leaving out Alexandria would change the size of the District or grant to Virginia the county of Alexandria? Or, suppose this Congress should define the boundary of this District so as to exclude a part of it ceded by Maryland, would *that* change the size of the District, especially if the purview and scope of the act had regard to a subject-matter wholly different from the question and policy of changing the size of the District? Or suppose the preamble of a law should recite that "whereas two square miles of this District as ceded by Maryland have been returned to Maryland," when no such retrocession had ever been made that would present a case stronger in the direction of accomplishing the retrocession than is furnished by any acts of Congress passed since 1846. And yet the law is thoroughly settled as it is laid down by Judge Story in his commentaries: "*The preamble can never enlarge—it cannot confer any power per se.*" Precisely of the same nature as preambles are all such parts of acts as are in the nature of mere recitals or mere assumptions either as to a state of fact or a state of law. Such assumptions when mistaken, are never permitted to change either the true state of the fact or of the law.

(See also Crespegny vs. Wittnoon, 4 Term R., 790; Edwards vs. Pope, 3 Scam., 465, and the cases cited in

Sedgewick on Statutes pages 43–'44, and in Wilson vs. Knabley, 7 East., 128; also Potters' Dwarris, 267, Ib. 108, 109.

Points Made by Defendant.

But to all the foregoing it is, in the opposing brief, replied in substance as follows:

1st. That even were the retrocession void still, by the assent of the United States and Virginia, there is, and for thirty years has been, at least a *de facto* government in Alexandria with *de facto* officers capable of collecting the taxes resisted in this action; and hence this tax can be collected because a *de facto* government, being better than chaos, is for the purposes of this collection, a government *de jure*.

2d. That even could such *de facto* government be overthrown by judgment of the Courts, as invalid, yet this can only be done by a proceeding between the sovereigns interested, to wit, the United States and Virginia, and cannot be tried in an action between citizens concerning a *private* right. These two points, we think, cover all that part of the opposing argument which does not relate to the validity of the act of 1846; and since these two points are kindred and run into each other, it may be best to reply to them together.

It seems to us that these points as to the validity of *de facto* governments, and of the acts of the officers thereof, wholly misses this case, and has no possible application thereto. The mistake is in assuming that to sustain the claim of plaintiff alleging the invalidity of this tax is to remit Alexandria to chaos, because that there is no other law or government to take its place if the government of Virginia is not recognized.

The obvious reply to the whole of this is that this is simply the ordinary question, which of two governments has jurisdiction over the property taxed in this case; and *that* question of jurisdiction to tax this property, depends, again, upon the question of the *boundary* line between Virginia and the District of Columbia; and that question as to where such boundary line is, depends, again, upon the question whether the old boundary line has ever been changed by any act of Congress of which this Court can take any notice.

If such be the legal characteristics of this case then self-evidently there is no place in this discussion for the production of learning touching trial to titles to office by *quo warranto*, or touching the nature of *de facto* governments, or about matters *inter gentes*, or concerning choices between "the wreck of society" and submission to governments originating in wrong. Most that is said on these interesting things in the opposing argument is excellent, only it misses this case. If Alexandria is on this side of the Virginia line then she is *not* in chaos, but in the District of Columbia, and at least theoretically, under law, good government and ample taxation; but then she is simply not under nor subject to *that* tax which Virginia assumes to collect in this case. It is not the *officer* nor the *office* this case puts on trial, but the *tax*, and the jurisdiction to assess it. It is, in short, the old question, ten thousand times tried in the courts in suits between private citizens, as to which of two jurisdictions has power over the subject-matter involved in the suit.

We are therefore brought to the question whether the true boundary of the District of Columbia may be inquired into in a case like this, where the right to collect the tax in question depends on the question where the boundary of the District in fact and in law is to be found.

Now let us assume for the moment that the peculiar *mode* in which it is claimed this District line was changed so as to put Alexandria in Virginia, does not so change the legal qualities of this controversy about the location of that line as to oust this Court's power to inquire into the question of the true location of the line. So for the moment, assuming, let us see whether in cases between private citizens the courts may not adjudge and settle where are the boundries between sovereign and contending States, which is, logically considered, the very thing the opposing brief says is incapable of being done by courts at all, being *inter gentes;* or, if possible to be done by the courts, must be in cases between States as immediate parties to the proceedings.

But this Court in that great case between Rhode Island and Massachusetts, 12 Peters, 657, wherein Mr. Webster and others of his like (if there be any others of his like) struggled to impress upon the court the same identical objections here urged, that courts cannot settle boundries of States by its decree, nor execute

such decree after made—expressly declare that "*the boundries of States can be thus decided collaterally in suits between individuals;*" see page 727: and in support of this the court there cited Fowler *vs.* Miller, 3 Dal., 411–12, and several other cases, to which we shall refer. And to all that part of the defendant's brief which urges, as a reason why this court should not pronounce a judgment in the present case, because "no judgment for the recovery of the territory by the United States could be pronounced in such proceeding," and because there is no way of enforcing the court's decree, we beg this court's attention to the decision and reasoning of this court in this same case, 12 Pet., 750.

The answer to every suggestion of this kind is in the words of the Court in Rhode Island vs. Massachusetts, when the court says: "This court cannot presume that any State which holds prerogative rights for the good of its citizens, and, by the Constitution, has agreed that those of any other State shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong or deny to a sister State or its citizens, or *refuse to submit to those decrees of this court, rendered pursuant to its own delegated authority.*"

And in the same case, even the dissenting opinion of Taney, C. J., p. 752, declares, "I doubt not the power of this court to hear and determine a controversy between States or between individuals in relation to the boundaries of States where the suit is brought to try a right of property in the soil, *or any other right* which is properly, the subject of judicial cognizance *and decision, and which depends upon the true line.*"

IN HOWARD VS. INGERSOLL, 13 HOWARD, 381,

the action was by one mill owner against another, for diverting water, and the question turned upon where the line was between Georgia and Alabama.

In that case, on page 420, the court declare, "This case involves a question of much higher interest and importance than a decision upon the rights of these parties; as the court see that the decision *cannot* be reached without a determination of the boundary line between two sovereign States, for a distance of some one hundred and fifty miles."

This was a case where no State was a party, and only individual

property rights were involved, and where the right turned wholly on the question where is the true State line. But neither of the judges had the slighest doubt about the power of the court to make that decision, although it collaterally settled the true place of the boundary line between two States, for a distance of a hundred and fifty miles.

HANDLY'S LESSEE VS. ANTHONY, 5 WHEAT., 374,

Is an ejectment case between two citizens, and no State was a party. Chief Justice Marshall declares (p. 381) that "the sole question in the case respected the boundary of Kentucky and Indiana, and the title depended entirely on that question," and the court proceed to decide expressly that a large peninsula of land separated from Indiana by a bayou, was in Indiana and not in Kentucky; and to define where such boundary is between the two States.

This therefore is a case like the present where only individuals were litigants—where the suit turned on the true legal location of a State line; and where there was no more power to enforce the opinion of the court touching that true location than there is in the case at bar; but that did not induce the court to refrain from determining the property rights which turned upon the question, where is the State line?

Again upon the point suggested by the defendant that this is a question *inter gentes* incapable of determination in the courts, especially where individuals are the litigants, we beg attention to the citation by this court, in Virginia vs. West Virginia, (11 Wall., 54,) of the language of Rhode Island vs. Mass., where the court says, "that title, jurisdiction, sovereignty are therefore dependent questions necessarily settled when boundary is ascertained, which being the line of territory is the line of power over it: so that great as questions of jurisdiction and sovereignty may be they depend on facts."

So that the judgments of this court must and do settle questions of sovereignty and jurisdiction when these depend on facts, as to boundary or any other matter of property right, cognizable by the courts. It is impossible to resist the force of that unbroken line of authorities which begin with Fowler vs. Lindsey, (3 D., 411,) in 1799, and reaches to this day; which establish completely and

in every particular the proposition that, when the property or personal rights of a citizen depend upon a question of jurisdiction or of locality, and these involve a question as to where the law and facts fix a particular boundary, whether that boundary be one between two States or one between a State and the high seas, or between a State and a fort, magazine, arsenal, or dockyard, or between a State and the District of Columbia, there the court may and *must* judicially determine the locality of that boundary; and thus determine the limits of State and Federal sovereignty and jurisdiction: and this whether the suit be one prosecuted by States, for the very purpose of establishing the line, or one prosecuted by individuals whose rights of person or property depend upon the true location of such boundary.

See such cases as 17 Johns, 225; 2 Mason, 60; Brightly, 302; 2 Whart. Crim. L., 490, 548; 1 Woolworth, 192; 1 Bond, 571; 2 Howard, 397; 8 Mass., 72; 17 Pick, 298; 1 Met., 580; 6 Opins., 577; 7 Opins., 633; 1 Black, 484. The case in 1 Met. presents and decides the very question of a State's right to levy taxes within a territory ceded to the United States. In these and multitudes of cases like them, the courts go completely into the very identical inquiries we invite the court to make in the present case, to wit: what is the *lex rei cite*; what jurisdiction dominates over the person or the property in suit; and, to the end that this may be found out, how and by what processes or laws doth each of the contending jurisdictions acquire or lose its alleged sway.

What has now been stated, we submit, answers all that is relied upon on the other side as to this being a choice between chaos and *some* government—as to the question being political—as to its being one *inter gentes*—as to there being no power to execute the judgment—as to its being incompetent for individuals to prosecute cases which require the determination of State lines or the boundary of State authority; and as to there being no government to take the place of that which levied this tax. It conclusively answers all these, unless, indeed, it can be said that because the place where the boundary between Virginia and this District will fall, depends in the present case, upon the *validity of the acts relied upon as having worked a change of that boundary*, is an element of this case which takes the inquiry about boundary

out of the field of judicial inquiry, and thus separates this case from the vast family of cases to which we have referred.

But we have already shown that the act of Congress attempting to make this change of boundary is absolutely void and no law—a thing, the existence of which this Court is compelled to completely ignore. We have shown that no subsequent act has enacted a retrocession, nor done more than take for granted the retrocession as a fact accomplished. We have shown that sovereignty can never be thus surrendered by indirection and mere implication. We have in short shown that there is no law in existence changing the old boundary of the District of Columbia from that first fixed under the Constitution; and these being the grounds on which we rest the claim that the first boundary has never been changed, is not that a bold proposition which asserts that the Courts cannot look to the question whether any law has ever been passed to change that boundary?

If this august Court be indeed forbidden from looking into the inquiry which we invite you to make, namely, has the first boundary of this District ever been changed, then the thing which forbids you must be something no less in its dignity and authority to command that LAW! But we have already shown that no LAW has changed the boundary. What else, conceivable or inconceivable, is capable of wresting from the United States its powers over its own seat of government, save and except some law so expressly ordaining?

The thing set up to prevent your making this inquiry about the true line of this District, is the government which, since 1846, has, as a *fact*, existed in and governed Alexandria by the consent of Virginia and the United States. It is aledged that there is something in this *fact* of thirty years' duration which this Court is forbidden to look into with the view of finding out whether it hath foundations in law.

If this be so and this Court is compelled, *nolens volens*, to accept as the legal one that government which has been over Alexandria since 1846, then this must be, because such government, as a political institution, is beyond the assailment of the judiciary. But, from the very nature of the case, this government of Alexandria, since 1846, must have originated in and been construed by one or the other of three sources of authority. One is

that which, in Suther vs. Borden, lead this Court to refrain from inquiring into the legality of the government of Rhode Island, to wit, that under the act of 1795, the executive was empowered to recognize and defend such one of two contending governments as he deemed the true one in a State; and that this act of the President, done under this act of Congress, *made* the recognized one the legal one, and bound the Courts. The one in Alexandria, since 1846, will not be pretended to belong to *that* class.

Another kind to which this government, by Virginia in Alexandria since 1846, *might* belong, would be one resulting from valid acts by Congress retroceding Alexandria to Virginia, and restoring to that State sovereignty there—which if accepted by the State would change the boundary of the District—would bind this Court; and if this be the status of the present case, then the case for the plaintiff is ended.

A third, and only other kind, to which this government in Alexandria, since 1846, might belong, would be that in the absence of all law by Congress, ceding either land or jurisdiction to Virginia—or, which is precisely the same thing, in the absence of all *valid* law—Virginia may have been permitted to exercise jurisdiction in Alexandria under the mistaken idea that it was restored to Virginia.

And it is to this third class we claim—and trust we have shown—this government in Alexandria belongs. If we have failed in showing this and the law of 1846 is one this Court can enforce, then plaintiff has no case. If the law of 1846 be void, then Virginia has ruled in Alexandria owing to inadvertance and mistake as to the state of the law; and by mere sufferance has controlled territory under the exclusive jurisdiction of the United States.

Now, if it be indeed *this* third class to which this government by Virginia in Alexandria has belonged, then pray what is there in its nature which forbids this Court to decide this land in Alexandria to be, by law, still in this District? Is it the Statute of Limitations that is to be pleaded? No—that is not it; and the highest Court of New York, in People vs. Godfrey, say sovereignty can, as between the States and the United States, *never* be acquired or lost, either tortiously or by disseizin, much less by mere occupancy. Then the thirty years is not the thing which

deprives you of power to inquire about the rightfulness of this thirty years' rule.

It is therefore no valid law which forbids the inquiry, for such we have shown does not exist. What then is it which doth hedge this Alexandria government around with the divinity which guards kings? There is nothing left which can shield it unless it be the unconstitutional law of 1846, and to say that—provided it be void—stands in the way of the inquiry is to say something higher in the ranks of the absurd than is mere *Reductio ad absurdam.* But really this resort to *argument* to show that there is nothing in the nature of the last thirty years' government in Alexandria which forbids you to decide upon its legality, is useless; because this court has, a hundred times, in exact legal principle and effect, decided that you may so inquire.

Take any one of the cases where the position of State or Federal lines was the question in the case, as, for example, Handly's Lessee *vs.* Anthony, 5 Wheat. Had that case gone the other way from what it did, a small county of land would have been wrested, by the court's decision, from the jurisdiction of Indiana and have been given to Kentucky, though Indiana had ruled it for several years. And although such was the case, no one, in that case, even suggested that the court was precluded from deciding in favor of Kentucky by the fact that Indiana had ruled that land for these years.

In short, there has not been a case in the illustrious history of this court, wherein the boundry between States, or the line of federal jurisdiction, was the point of inquiry, where this court has hesitated to look into *every* question, whether of law or fact, which tended to fix that line—and this whether such question was the wording or construction of a law, ordinance or compact—the existence, non-existence, or validity of a law, or any other thing which, in law, tended to fix the limits of that jurisdiction upon which the case depended.

So this Court say expressly in Rhode Island vs. Massachusetts, (12 Pet., 744,) where the words are: "Let the question arise as it may, in a case in equity or a case at law, of a civil or criminal nature; and whether it affects the rights of individuals or of States, and depends on charters, *laws*, treaties, compacts or cessions which relate to boundary," &c.

And, in this case, we ask of the court what it has done in every other analogous case since the government was organized, namely, inquire whether any law has ever changed the boundary of this District from those it obtained from the hands of the authors of the government.

SHELLABARGER & WILSON,

Of Counsel for Plaintiff.

IN THE

SUPREME COURT OF THE UNITED STATES

PHILLIPS *vs.* PAYNE.

BRIEF FOR DEFENDANT.

IN THE SUPREME COURT OF THE UNITED STATE

ROBERT A. PHILIPS *vs.* CHARLES W. PAYNE.

BRIEF FOR DEFENDANT.

Before the year 1846, the county of Alexandria formed a part the District of Columbia. In that year the state of Virginia sumed jurisdiction over it, by virtue of a cession of the cou then made to her by the United States. Her revenue laws, a all her laws, were, soon after, extended over the ceded territo and have prevailed there ever since with full authority. T United States has never since questioned the right of Virginia any way. But the plaintiff, a resident of the county, holding p perty there, assessed with taxes under the revenue laws of t state, refused to pay them, and when threatened with a levy on property to satisfy them, by the appointed officer, paid the ta under protest, and sued the officer in assumpsit for *money had a received*, to recover the amount paid. His avowed object is to t the question, in that way, of the state's right of jurisdiction ov the county—in effect, to try the validity of the cession by the Unit States—and should that question be decided judicially in his fav under such encouragement, to agitate in Congress the reclamati of the territory by the Urited States. For it is claimed that t cession was made in violation of the Constitution, and is therefo void; and that it is, moreover, inoperative, because it was effect by a law of Congress which "purports to delegate legislati power."

Should the plaintiff succeed in his action, others, it may be su posed, will follow his example, and there will be a failure to colle the public revenue in the county; other proceedings of governme

y be questioned and resisted in like manner, and the govern-
nt itself may come to an end, or exist only by permission. Nor
uld any other government succeed to that of which the people
uld thus have been practically deprived; for no judgment for
e recovery of the territory by the United States could be pro-
unced in such proceedings; nor would Congress be thereby fur-
hed with any means of reclamation which it did not possess
fore. Consequences so inconvenient and destructive of order,
easures so fruitless and ineffectual, suggest the enquiry whether
e action lies? whether there does not exist a mode of trying this
estion in a case between proper parties, to be followed by a
dgment which will be direct and conclusive on the merits? Fur-
er, is there any reason to doubt the validity of the cession, or of
e means by which it was effected?

1. The form of action is inappropriate. The action for money
d and received, is likened to a bill in equity for the recovery of
oney due *ex æquo et bono*. But this is more an illustration of its
aracter than a definition. It is qualified and limited in its appli-
tion by settled precedents. "In some cases, though the money
ay have been received tortiously or by duress of the person, it
ay be recovered in that form of action, the law implying a con-
act in favor of the party entitled; as against a person who has
urped an office (legally existing), and received the known and ac-
stomed fees of office." Chitty's Pl. 87. So where an officer,
ghtfully in office, has taken goods not liable to seizure, the tort
ay be waived for an action *ex contractu*; as in the case of a col-
ctor of customs. Elliott *v.* Swartout, 10 Pet. 150, and other cases
ed for the plaintiff. But the action cannot be used to try the
estion, whether a state which has created an office and filled it,
d the power to do so, in point of territorial jurisdiction, or other-
ise. Nor is it the proper form for trying a title to office in any
se. That is the office of the writ of *quo warranto*.

But no action lies. It may be said, upon the assumption that the
ssion is void, that the collector here was an officer *de facto*,
hose acts concerning individuals and the public, are good when
llaterally questioned, but not when they are directly assailed in
proceeding to which he is a party. The law on this subject is
ell understood. It is conceded that the rule which supports the
ts of a person "who has the reputation of being the officer he
sumes to be, although he is not such in point of law," is designed
mply to protect the public, by preventing a failure of justice. It

gives to the person so acting, no immunities, and shields him fr
no responsibility. If he sues for the fees of office, he cannot
cover without proving a legal title. It he is sued for his acts, he c
not avoid liability by showing that he is only an officer *de fa*
But this doctrine supposes that there is or may be one with a b
ter title, an officer *de jure*, existing or capable of being brou
into existence by election or appointment. Where there is
room for that presumption, the distinction between the two so
of agent, *de jure* and *de facto*, has no place. Where a governm
exercises supreme and uncontrollable authority over a country,
a district of country, even though originating and continued
wrong, as afterwards declared, it concerns the existence and saf
of mankind that its acts and the acts of its officers, done whil
endures, shall be respected and upheld. There is no alternat
between obedience to them, and a lawless condition of things. Th
are *de jure*, because there is no higher authority which can, for
time, be exercised. The right is in such cases a matter *inter gen*
depending upon treaties and principles of public law, and is entir
beyond the field of private contestation. Although in political
menclature such a government may be distinguished as *de fa*
from another which rightfully succeeds it, it is not the less supre
while its authority, notorious and undisputed, continues. No
here the officer was clothed with all the formalities of office by
government of Virginia, then in full dominion over the county
Alexandria. No better appointment could be made.

Furthermore, that dominion was exercised with the sanction
the only power which it is claimed might dispute it—the Uni
States. Thus both sovereignties united in upholding the author
from which the officer derived his appointment, from whose jo
will there could be no appeal; and thus the officer was *de ju*
and his acts, within the limits of his office, unquestionable.

This principle grows out of a necessity so strong as to have qu
ified, if it has not overcome the principle of perpetual allegia
in the English monarchy. In 1641, on the accession of Edw
IV, parliament declared the previous kings of the House of L
caster usurpers; but, at the same time, declared them kings
facto. "In Statute 1, Edward IV, the three Henrys are styled 'l
kings of England successively in dede but not of ryght,' and
all the charters I have met with of King Edward, wherever he h
occasion to speak of the line of Lancaster, he calls them "*nuper*
facto, et non de jure reges Angliæ." (1 Bl. Com., 204.) "Treas

nmitted against Henry VI, were punished under Edward IV, ugh all the line of Lancaster had been previously declared usurp- by act of parliament. (Id., Book 4, 78.) The Statute of Henry I, chapter 1, which exempts all subjects from any penalty or for- ture, "which do assist or obey a king *de facto*," is held to be dec- atory of the common law. (Id.) And Hawkins (1 P. C., 36,) car- s the doctrine to an extent which is condemned by Blackstone— t a king out of possession, is so far from having any right to egiance by any title he may have against the king in being, t the subject is bound by the duty of allegiance to resist him. the successive revolutions in the British government, from the narchy to the Commonwealth and the Protectorate, from these to Monarchy again, and in the successive political changes which lowed, no question has ever been raised as to the *de jure* author- of civil officers, appointed by the government existing for the e. And in the rapid revolutions of political authority, which ve been lately witnessed in this country, no such question has n entertained in regard to the civil officers appointed by the cessive state governments, acting for the preservation of order, l the peace of society. So far from it, in Virginia the judgments l decrees of the judges of the Court of Appeals, who were in office der military appointment when the state was restored to Union, holding over and continuing to exercise their offices re held valid and binding; and more, it was considered that the tored State legislature, when it come to legislate on the subject, uld not authorize them to be reheard. Griffin's executor *vs.* nningham, 20 Gratt., 31.) So, this court, while it has denounced void all acts of the governments of the late Confederate States, l their officers, aimed at the overthrow of the authority of United States, has supported their acts, judicial or other, ne in the interests of order, and for the good of society. he acts of the several states in their individual capacities, and their different departments, executive, legislative and judicial, ring the war, so far as they did not impair, or tend to impair, supremacy of the national authority, or the just rights of citi- s under the constitution, are in general to be treated as valid l binding." (Horn *v.* Lockhart, 17 Wall, p. 571.)

Now, it may happen, in the order of events, that the United tes will reclaim this ceded territory from Virginia, and a new angement in regard to it may succeed to the present. But to that in advance of such an event, the peaceful order of thirty

years which has prevailed there with the sanction of both gover
ments, shall be upturned at the bidding of individuals, so th
chaos shall ensue, seems hardly short of an affront to comm
reason.

2. Should Virginia ever be deprived of this territory, it must
by the agency of the United States, and in their name. The judici
power, under the constitution, extends "to controversies to whi
the United States shall be a party;" and the original jurisdictio
of this court embraces all cases in which "a state shall be a party
"It seems scarcely possible to raise a reasonable doubt as to th
propriety of giving to the national courts jurisdiction in cases
which the United States are a party." Story, Con. § 1,674, cit
the Federalist and Elliott's Debates. "Controversies," as here a
plied, "seems particularly appropriate to such disputes as mig
arise between the United States, and any one or more states, r
specting territorial or fiscal matters; or between the United Stat
and their debtors, contractors, and agents." (1 Tucker's Blac
Com. 420, cited by Story.) Such a "controversy" would be jud
cial in its nature, not political; as it would involve a question
territory, boundary; and the political effect of the decision woul
be but incidental. (Rhode Island *vs.* Massachusetts, 12 Peter
657; Virginia *vs.* West Virginia, 11 Wall, 79.) The case would b
between proper parties, and the judgment pronounced would b
final and conclusive on the merits.

3. There was full power in the United States, under the constitu
tion, to cede this part of the District of Columbia. There is certainl
no restriction on the power, express or implied. Congress has powe
"to exercise exclusive legislation in all cases whatsoever over suc
district (*not exceeding* ten miles square), as may, by cession of pa
ticular states, and the acceptance of Congress, become the seat o
the government of the United States." The district was mad
originally ten miles square. But it might have been made of les
extent, had such been the judgment of Congress, or its agents, wh
were entrusted with the duty of acquiring and laying it out wit
its approval; for it was to be "*not exceeding*" ten miles square, tha
being the only prescription as to extent. Now, if experienc
showed, as it notoriously did, that the part on the south side of th
river Potomac, was a useless and burdensome possession, was th
United States forbidden to dispose of it? "The Congress shal
have power to *dispose* of and make all needful rules and regulation
respecting the territory or other property of the United States."

Whatever doubt may have been suggested whether this power extends to foreign territory acquired by the United States, after the adoption of the Constitution, there never was a question made of its application to all the territory and property of the Union, to that acquired within the limits of the original states, and to the territories then existing. It will not be questioned that Congress may dispose of "all places" acquired from the states "for erection of forts, magazines, arsenals, dock-yards, and other needful buildings," should they become useless after being acquired. Yet the power to acquire them, and to exercise legislation over them, is given in the same clause, with the power to acquire and to legislate for the district, the only restriction being that the district shall be "not exceeding ten miles square." The opposing argument assumes, that when Congress had acquired the district, with its limits as they then were, its power over the subject was exhausted; that the territory, as it then stood, became dedicated sacredly as the seat of government, exempt from change under every vicissitude, and against every suggestion of policy and convenience. Such reasoning leads to the conclusion that the seat of government never can be changed from its present site, or if it may, that the original territory must be retained forever as a useless appendage—a dilemma not far from the borders of absurdity.

4. The act of Congress under which, should the people of Alexandria county vote in favor of the measure, the county was to stand retransferred to the state of Virginia, was but a legislative grant, upon condition. It was not a *law* emanating from legislative power, in the sense in which *law* is defined and understood—"a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." There cannot be a doubt, assuming that Congress had power to make the cession, that it might have consulted the wish of the people upon the measure in advance, and upon finding them favorably disposed towards it, have ceded the territory accordingly. What substantial difference is there between such a course and that which was actually adopted? The people of the county did not *legislate*, they merely signified their willingness to change their political relations, as a fact, an event, depending on which the act of session was to operate. Such enactments are very common where the legislature is dealing with local interests, or interests peculiar to sub-divisions of the people, as counties, towns, school districts and the like. Bull *v.* Read, 13 Gratt. 78, and the cases there collected. But a wider scope has been given to

the same principle. Thus, the non-intercouse laws of the Unite States, in 1809 and 1810, were expressly made to depend, f their operation, upon the course that might be thereafter adopte by England and France, in the way of commercial orders, to b made known by the President's proclamation; and this was su tained by the Supreme court. Brig Aurora *v.* U. S., 7 Cranch, 38 Virginia *v.* West Virginia, *supra*. In this case it appears that Co gress passed an act approving the constitution adopted by We Virginia, and admitting her into the Union as a state, with proviso. The proviso recited that it had been represented to Co gress that since the constitution was adopted by the conventio which framed it, the people of the state had expressed the wish t change the article in it concerning slavery; it was, therefore, e acted that when the people should, through their convention an by a popular vote, make and ratify the change, and the same shoul be properly certified to the President of the United States, th officer should issue his proclamation stating the fact; and, ther upon, the act of admission should take effect and be in force aft sixty days from the date of the proclamation. This was regarde as a valid act of admission. Instances of concurrent legislation b states—the law of one state to be operative, when the law of th other shall have passed, are familiar.

But suppose the means adopted for the transfer of the title, t have failed for want of attention to the forms of legislation. Do that vacate the agreement by which Alexandria county, with th assent of its people, became the property of Virginia? Both pa ties agreed, with that assent, (without which, according to Amer can ideas, it would have been improper, if legal,) that the territor should change hands. It was a proper subject of contract, and th capacity of the parties to contract, in regard to it, will not be que tioned. There was a contract, and possession was taken unde its terms, which Virginia has retained, with the full *insignia* of sove reign authority, ever since. It may be likened to a case of specifi performance of a contract, partly performed. The transaction ma now be clothed with the proper forms, if they have been omitte Here was no *tort*, nor *disseisin*, but the possession, acquired under perfect understanding, has continued, in consistency with the in terest and desire of the former owner, as is shown by the supple mentary legislation of Congress to carry out the arrangemen Could the United States, after such a lapse of time and acquiescence question the right of Virginia? There is no statute of limitatio

such a case, for want of a common superior to prescribe it. But, say that the political relations of the county, and its people, are ot changed by what has occurred, is to banish from the concerns f states the wholesome influence of occupation and prescription, hich is so fully recognized by public writers. Wheaton's Elements, ch. 4, § 4, note 1, (p. 218.) "For the security of rights, hether of states or individuals, long possession, with a claim of tle, is protected; and there is no controversy in which this great rinciple may be invoked with greater justice and propriety, than n a case of boundary." Howard, 4th vol. 629, Rhode Island *v.* lassachusetts.

But the validity of the cession, and of the means by which it was ffected, has been adjudicated, expressly by the court of appeals of irginia, and by the strongest implication by this court. McLaughin *v.* Bank of Potomac, 7 Gratt. 68. The court of appeals held hat a cause on appeal from the circuit court of the District of olumbia, held for the county of Alexandria, pending at the time f the cession, was properly heard by the Supreme court after the ession, and properly certified by that court to the Virginia court hich succeeded the Federal tribunal, and that it should be enforced y the Virginia court. "It is admitted on all hands that Congress ad the constitutional power of retroceding, and Virginia the power f accepting the retrocession of territory ceded by the latter to the ormer, as above mentioned; and it follows that these parties had he like incidental powers of legislation, to give effect to the retroession, as they possessed in regard to the original cession, and inurred the like obligations of duty, in regard to the rights and emedies of individuals existing at the time of the retrocession." p. 72, 73. "In the series of acts on both sides, by which the meaure was effected, a supplemental act of Congress, of July, 1848, was passed, by which provision was made for the continued jurisdiction of the supreme court, in causes pending therein from the ircuit court of the district for the county of Alexandria, at the ime when the jurisdiction and laws of Virginia were extended over he same; and for the transmission of its adjudications in such appellate causes, to the proper tribunal of Virginia," invested by her aws with jurisdiction to carry the same into effect. p. 73. This ourt, in carrying out the act, impliedly evinced its judgment of he substantial question in this case.

R. T. DANIEL.